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Supreme Court, U.S.
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In The

Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO,

Petitioner,

v.

ALLEN HARMAN,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an award of $1.1 million in attorneys' fees presumptively unreasonable within the meaning of 42 U.S.C. § 1988 where a plaintiff recovers only $30,300 in damages on his employment discrimination claim, and where the plaintiff does not prevail on any of his claims for injunctive and declaratory relief?

PARTIES TO THE PROCEEDING

Petitioner is the City and County of San Francisco. Respondent is Allen Harman, an individual.

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The order of the California Supreme Court denying the Petition for Review is located in the Appendix at Pet. App. 161. The opinion from the California Court of Appeal is published at 158 Cal. App. 4th 407. It is reprinted in the Appendix at Pet. App. 1. The opinion from the Superior Court is reprinted in the Appendix at Pet. App. 37.

JURISDICTIONAL STATEMENT

The opinion of the California Court of Appeal was entered on December 21, 2007. The California Supreme Court denied a Petition for Review on March 12, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT STATUTORY PROVISION

42 U.S.C. § 1988(b) provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's

> fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b) (internal citations omitted).

STATEMENT

More than twenty years ago, Justice Powell wrote in his concurring opinion in *City of Riverside v. Rivera* that "[i]t probably will be the rare case in which an award of private damages can be said to benefit the public interest to an extent that would justify" an attorneys' fee award of seven times the amount of damages recovered. 477 U.S. 561, 586 n.3, 106 S. Ct. 2686, 2700, 91 L. Ed. 2d 466 (1986). Since that time, many courts have heeded Justice Powell's cautionary words when reviewing fee awards under 42 U.S.C. § 1988. *See, e.g., Cole v. Wodziak*, 169 F.3d 486, 488 (7th Cir. 1999) (Easterbrook, J.) (holding attorneys' fee award 19 times greater than damages was "off the map"). Other courts, however, have not. *See Morales v. City of San Rafael*, 96 F.3d 359, 365 (9th Cir. 1996) (Reinhardt, J.) (holding district court abused its discretion by failing to award fees eight times greater than damages); *cf. Morales*, 96 F.3d at 365 ("A lawyer's fee of $139,783.25 for getting a client $17,500 is obscene.") (Kleinfeld, J., dissenting). Indeed,

some courts have held that a trial court cannot reduce an attorneys' fee award on the ground that it is grossly disproportionate to the damages recovered. *See, e.g., Davis v. Southeastern Penn. Transp. Auth.*, 924 F.2d 51 (3d Cir. 1991) (holding district court abused its discretion in reducing fee award 11 times higher than damages because "it is not permissible for a trial judge to make a reduction in the attorney's fee award solely on the basis of proportionality"); *Quesada v. Thomason*, 850 F.2d 537 (9th Cir. 1988) ("The district court should not have reduced the attorney's fees simply because the damage award was small.").

In the case below, the trial court's failure to reduce the fee award based on the relationship between the attorneys' fees and the relief obtained for the client led to an absurd result. The plaintiff recovered less than $31,000 in damages in his employment discrimination suit against the City and County of San Francisco ("City"), but the trial court awarded him more than $1.1 million in attorneys' fees. California's appellate courts let that stand despite the fact that: (i) the award was 36 times the amount of damages recovered and more than 16 times the amount of damages sought at trial; (ii) the plaintiff lost all his other claims, and his two co-plaintiffs recovered nothing; and (iii) the lawsuit led only to a recovery of private damages, not any injunctive relief with respect to the City's employment practices.

Allowing runaway fee awards such as this one to stand creates an economic incentive for plaintiffs' attorneys to overvalue their cases, avoid settlement,

and litigate cases of little personal or public value to the bitter end in hopes of securing a windfall in attorneys' fees for themselves. *Farrar v. Hobby*, 506 U.S. 103, 115, 113 S. Ct. 566, 575, 121 L. Ed. 2d 494 (1992) ("[F]ee awards under § 1988 were never intended to produce windfalls to attorneys.") (internal quotations omitted). And the California Court of Appeal decision adds to the list of published opinions that give courts license to award fees far out of proportion to damages recovered, in contravention of the principle articulated by Justice Powell more than two decades ago.

This Court should grant the petition in this case to give force to Justice Powell's admonition that a fee award is presumptively unreasonable if it is grossly disproportional to the damages recovered, to resolve the confusion among the lower courts on this issue, and to curb run-away attorneys' fee awards that provide a windfall to attorneys at the expense of municipalities and their tax payers.

* * *

This case began in September 1999 when three white males – John McGoldrick, Allen Harman and Stephen Cheresnik – sued the City for employment discrimination. The plaintiffs, Airfield Safety Officers at the San Francisco International Airport, alleged that they were on an eligibility list that put them in line for promotion to Operations Supervisors, but the Airport passed them over in favor of a minority candidate. McGoldrick, Harman and Cheresnik filed

a complaint in federal court seeking damages as well as broad injunctive and declaratory relief under both Article I, section 31 of the California Constitution ("Proposition 209") and the Fourteenth Amendment's Equal Protection Clause. After a lengthy federal court proceeding that culminated with an appeal to the Ninth Circuit Court of Appeals, plaintiffs and the City stipulated to the filing of a new complaint in state court. Pet. App. 54.

Once in state court, the trial court granted the City's demurrer as to the damages claims under Proposition 209 and, following discovery, the City's motion for summary judgment on the remaining causes of action. Pet. App. 54-55. McGoldrick, Harman and Cheresnik appealed, and the Court of Appeal affirmed in all respects but one. First, it upheld the trial court's ruling on all three claims for equitable relief. The court held that even if the Airport's past policies may have been inconsistent with evolving legal standards under federal and state law, equitable relief was not appropriate because the Airport had voluntarily altered those policies to become "consistent with the current equal protection jurisprudence and Proposition 209." Pet. App. 139. The Court specifically noted that it found "no basis in the record to question the Airport's commitment to conform to changing legal standards in the area of employment policy." Pet. App. 141.

Second, after disposing of all three claims for equitable relief, the Court turned to plaintiffs' claims for damages under Proposition 209 and the Equal

Protection Clause. The Court ruled that the trial court correctly dismissed plaintiffs' damages claims under Proposition 209. The Court also affirmed summary judgment in favor of the City on McGoldrick's and Cheresnik's Equal Protection claims because "the provisional eligibility list would not in any event have been extended long enough to assist them." Pet. App. 156. As to Harman's claim for damages under federal law, however, the Court of Appeal found that a genuine issue of material fact existed as to whether Harman would have received a promotion earlier if not for a discriminatory employment decision, and remanded for a trial on this single remaining issue. Harman had been promoted to his desired Operations Supervisor position less than one year after he claimed to have been passed over for promotion, thus rendering any possible economic damages minimal.

At trial, Harman asked the jury to award him $39,000 in economic damages lost wages and $30,000 in emotional distress damages. Pet. App. 47.[1] The jury awarded him $15,300 in economic damages – roughly one third of what he requested. The jury also awarded $15,000 in emotional distress damages, for a total of $30,300. *Id.* In the wake of his $30,300 recovery, Harman moved for attorneys' fees under U.S.C. § 1988 in the amount of $1,095,202.90, and the trial court awarded that entire amount.

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[1] Approximately one month before trial, the City offered to settle the case for $25,000, but Harman refused to accept less than $600,000 plus attorneys' fees. Pet. App. 103.

The City appealed both the merits and the fee award. On the issue of attorneys' fees, the Court of Appeal vacated the award noting that courts "often display a marked restraint in approving attorney fee awards in amounts that constitute a high multiple of damages." Pet. App. 107. "Offsetting the general pattern of restraint," however, was *Morales v. City of San Rafael*, 96 F.3d 359, 361 (9th Cir. 1996), which approved a fee award eight times the amount of damages on the theory that "[s]uccess is measured not only by the amount of the recovery but also in terms of the significance of the legal issue on which the plaintiff prevailed and the public purpose the litigation served." Pet. App. 111 (quoting *Morales*, 96 F.3d at 365). In this case, however, a "public benefit" could not justify the large attorneys' fee award. As the California Court of Appeal explained:

> [T]he public benefit in the case at bar is circumscribed by the scope of the adjudication. Our review of the evidence revealed that Harman succeeded only in challenging the conduct of the EEO Manager in approving provisional appointments at the Airport. He cannot reasonably claim a significant public benefit in an alleged institutional impact that exceeds the scope of his proof at trial.

Pet. App. 111.[2] In light of the limited success achieved, the Court of Appeal remanded the matter to

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[2] Harman's attorneys argued that their success was significant because Harman achieved a promotion and the City

(Continued on following page)

the trial court to (1) "exclude hours expended on claims that are unrelated to the claim of damages on which Harman succeeded at trial," and (2) "reduce the award to reflect the limited nature of Harman's relief in comparison with the scope of the litigation as a whole." Pet. App. 112.

After remand, instead of reducing his overall fee request, Harman increased it to $1,118,457.77 to account for his attorneys' work related to the appeal. Refusing to exclude the vast majority of the hours billed for the unsuccessful plaintiffs and unsuccessful claims, on the theory that the work would have been necessary anyway, the trial court granted the new fee request almost in its entirety, awarding a final amount of $1,113,905.40. Pet. App. 51. Despite the fact that Harman requested fees that were *36 times* the amount recovered in damages, the trial court

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abandoned the challenged hiring practices while this litigation was pending before the trial court. As the Court of Appeal explained, however, the City changed its practices independently as part of its "commitment to conform to changing legal standards in the area of employment policy," rather than in response to Harman's claims. Pet. App. 140-41 ("It is implausible . . . to regard the Airport's change of policy in the year 2000 plan as a ploy to secure dismissal of the plaintiffs' claims since it was adopted approximately one year before the Airport filed its motion for summary judgment. The revised policy clearly reflects the evolving legal standards of employment discrimination.").

determined that no further reduction to account for Harman's limited success was warranted.[3]

The City appealed the increased award, arguing that the trial court should have reduced it dramatically to account for the plaintiffs' limited success. The City further argued that the trial court abused its discretion in awarding fees in an amount 36 times the damages award given the requirement that the court consider proportionality and the cases in which trial and appellate courts have treated fee awards that greatly exceed damages as presumptively unreasonable. The City also noted the trial court's erroneous assessment of public benefit, which flew directly in the face of the Court of Appeal's prior opinions.

Nonetheless, the Court of Appeal felt "constrained to affirm" the $1.1 million fee award "in view of the broad discretion granted to the trial court."[4] Pet. App. 1. Citing numerous circuit court opinions that affirmed similarly disproportionate fee awards, the Court of Appeal concluded that the trial court was

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[3] The reasons the judge gave for awarding $1,113,905.40 in attorneys' fees contradicted several aspects of the appellate court's prior rulings. For example, although the Court of Appeal had held that the Airport's change in employment practices was independent from the lawsuit, the trial judge asserted inexplicably that "Defendants changed their challenged practice at the time they did because of Plaintiff's lawsuit." Pet. App. 47.

[4] The court reversed a small portion of the fee award to disallow fees for work performed on the attorneys' fees issue in the prior appeal. It remanded to the trial court to identify and deduct only those fees. Pet. App. 35.

within its discretion to excise from the fee request only those hours identifiably spent on unrelated claims and to refuse to make further reductions. Pet. App. 30-31. Although the Court of Appeal agreed with the City that the trial court overvalued the "public benefit" in this case, it deferred to the trial court's conclusion that the fee award was not out of proportion to plaintiff's overall success and the significance of the litigation. Pet. App. 31.

The City petitioned the California Supreme Court for review. That petition was denied over the objection of two Justices. Pet. App. 161. Because this case presents an important question of federal law with significant ramifications for governments and other defendants, and because it provides the Court an opportunity to resolve confusion about whether, and the degree to which, proportionality between fees and damages should be considered, the City now petitions for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RESOLVE THE CONFUSION AMONG LOWER COURTS OVER WHETHER A FEE AWARD THAT IS GROSSLY DISPROPORTIONATE TO DAMAGES IS PRESUMPTIVELY UNREASONABLE WITHIN THE MEANING OF 42 U.S.C. § 1988.

42 U.S.C. § 1988 requires that an award of attorneys' fees be "reasonable," and reasonableness is the touchstone of the fee analysis. *See* 42 U.S.C. § 1988; *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). Reason is turned on its head, however, when a $30,300 damages award in a simple, employment discrimination case supports an attorneys' fee award of over $1.1 million. The windfall to the plaintiffs' attorneys in this case is not an isolated example. Rather, it resulted from the confusion among the circuit courts over whether a fee award that is grossly disproportionate to the value of the relief sought or recovered for the client must be considered "reasonable," or whether it should be considered presumptively unreasonable.

This Court's prior decisions demonstrate that the reasonableness of a fee request must be considered in proportion to the significance of the relief obtained. Indeed, the "degree of success obtained" is the "most critical factor" when considering the reasonableness of a fee award. *Hensley*, 461 U.S. at 436. In *Hensley*, the Court considered whether a plaintiff may recover attorneys' fees for work performed on unsuccessful

claims. The Court instructed the lower courts to "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation," and to award full fees only "if the relief obtained justified that expenditure of attorney time." *Id.* at 435 & n.11. The amount of time spent on the litigation multiplied by the attorneys' reasonable hourly rates may be "an excessive amount" where the plaintiff only achieved partial success. *Id.* at 436. Thus, a court should reduce the fee award "if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Id.* at 440.

This Court reaffirmed the principle that attorneys' fees must bear a reasonable relationship to the relief obtained in *City of Riverside v. Rivera,* 477 U.S. 561 (1986). In *Riverside*, this Court considered whether fee awards that exceed the amount of damages can ever be "reasonable" within the meaning of § 1988. The trial court had awarded the plaintiffs $33,350 in compensatory and punitive damages, and $245,456 in attorneys' fees. *Id.* at 564-565 (plurality opinion). This award came after detailed factual findings by the trial court that the lawsuit had served to curb the police department's "institutional behavior" of deliberately violating the Fourth Amendment rights of Chicano citizens, and that injunctive relief would have been warranted had the plaintiffs sought it. *Id.* at 574-575.

In a plurality opinion, Justice Brennan found simply that the fee award did not constitute an abuse

of discretion because the litigation "served the public interest." *Id.* at 574. But Justice Powell – who cast the fifth vote[5] – emphasized that fee awards should generally not exceed the amount of damages. As Justice Powell sought to establish, the absence of a "strict proportionality" rule does not mean courts have discretion to grant fee requests that are wildly disproportionate to the amount of damages recovered. Indeed, Justice Powell noted that the 7-1 ratio of fees to damages seemed unreasonable "on its face." *Id.* at 581. Such disproportionality was only justified in *Riverside* because the plaintiffs achieved a significant institutional behavior shift in addition to their damages recovery. *Id.* at 574-75 (plurality opinion). Justice Powell found that although a fee award of seven times the amount of damages could be upheld "in the special circumstances of this case," it would be "the rare case in which an award of *private damages* can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case." *Id.* at 586 n.3 (Powell, J., concurring) (emphasis in original).

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[5] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal citation and quotations omitted); *see also Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1161 (9th Cir. 2003).

Most recently, in *Farrar v. Hobby*, 506 U.S. 103 (1992), this Court again reaffirmed that attorneys' fee awards must bear some reasonable relationship to the recovery received by the plaintiff. "Where recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Id.* at 114 (quoting *Riverside*, 477 U.S. at 585 (Powell, J., concurring in judgment)). Thus, if a plaintiff obtains only limited success, a "court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness, or multiplying the number of hours reasonably expended . . . by a reasonable hourly rate." *Id.* at 115 (internal quotations and citations omitted). Again, "the most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Id.* at 114 (internal quotations and citations omitted).

In light of *Hensley*, *Riverside*, and *Farrar*, numerous circuit courts have appropriately presumed that a fee award is unreasonable if it is grossly disproportionate to damages. These courts have held that trial courts must ensure that fee awards bear some reasonable degree of proportionality to the results obtained in the litigation. *See Cole v. Wodziak*, 169 F.3d 486 (7th Cir. 1999) (reversing fee award because 19-1 ratio between attorneys' fees and damages was "off the map"); *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041 (5th Cir. 1998) (reduction of fee award to $81,000 not sufficient where damages were only

$12,233); *Gumbhir v. Curators of the Univ. of Missouri*, 157 F.3d 1141, 1146 (8th Cir. 1998) (reducing fee award from $110,000 to $46,750 in wake of $8,846 recovery); *Corder v. Brown*, 25 F.3d 833 (9th Cir. 1994) (trial court abused discretion in awarding $240,695 in fees after a $24,006 recovery); *McGinnis v. Kentucky Fried Chicken of California*, 51 F.3d 805 (9th Cir. 1994) (fee award of $148,000 inappropriate following monetary recovery of $34,000).

Other circuit courts, however, have readily countenanced attorneys' fees that dwarf the recovery obtained for the client. *See Morales v. City of San Rafael*, 96 F.3d 359 (9th Cir. 1996) (holding district court erred in reducing fee request that was eight times higher than damages based on proportionality); *see also Northeast Women's Center v. McMonagle*, 889 F.2d 466 (3d Cir. 1989) (affirming attorneys' fee award 24 times greater than damages in RICO case). Indeed, some courts have held that it is error for a trial court to reduce attorneys' fees based on the lack of proportionality between the fee request and the damages recovered for the client. *See Kassim v. City of Schenectady*, 415 F.3d 246 (2d Cir. 2005) (holding district court erred by reducing attorneys' fee request 30 times higher than damages recovery based on the "perceived disproportionality" between attorneys' fees and damages); *Davis v. Southeastern Penn. Trans. Auth.*, 924 F.2d 51 (3d Cir. 1991) (holding district court erred in reducing fee award 11 times higher than damages because "it is not permissible for a trial judge to make a reduction in the attorney's fee award

solely on the basis of proportionality"); *Quesada v. Thomason*, 850 F.2d 537 (9th Cir. 1988) ("The district court should not have reduced the attorney's fees simply because the damage award was small."); *see also Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 296 (1st Cir. 2001) (holding "proportionality" is not a relevant factor in determining the reasonableness of an attorneys' fee award after the plaintiff has "isolated the time spent on her successful claim or claims").[6]

These contradictory lines of cases have left lower courts to guess at what standards apply when determining the reasonableness of attorneys' fee requests. This case illustrates the resulting confusion. Here, after the trial court first awarded nearly $1.1 million in attorneys' fees, the California Court of Appeal reversed and remanded in light of the cases, such as *Cole* and *Gumbhir*, that demonstrate "marked restraint in approving attorney fee awards in amounts that constitute a high multiple of damages," Pet. App. 107, and thus directed the trial court to consider proportionality. On remand, however, the trial court refused to reduce the award based on proportionality and again awarded approximately $1.1 million in

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[6] Respondents will undoubtedly argue that these opinions do not create a "square" circuit split because each decision arises out of unique facts. However, as discussed further in section II, *supra*, such logic would effectively immunize all fee awards from review by this Court because all such awards are, by definition, fact-based to some degree.

fees. Although the trial court had ignored its instructions, the California Court of Appeal felt "constrained" to affirm this grossly disproportionate fee award because attorneys' fees are ordinarily left to the discretion of the trial court and because some cases, such as *Morales*, approved disproportionate fees.

Courts that have struck down fee awards on proportionality grounds have done so either where the fees are out of proportion to the results obtained in the litigation, or because the expenditure of attorney time was unreasonable *from the outset* in light of what was at stake in the litigation. Here, the fee award is unreasonable in both respects. In this case, a single race-conscious employment decision by a city employee spawned not an appropriately limited, individual civil rights lawsuit, but instead a gigantic lawsuit involving three plaintiffs, various claims for injunctive relief, and numerous appeals. Out of the claims presented against the City by three different plaintiffs, only Harman succeeded, and only on a single claim. Along the way, however, Harman's attorneys ran up fees of over $1.1 million in a case worth only $30,300 for the client. Such a result is untenable. *See Hensley*, 461 U.S. at 436 (holding the time compensated by an attorneys' fee award must be "reasonable in relation to the success achieved"); *see also Migis*, 135 F.3d at 1049 (Barksdale, J.) ("Here, out of a plethora of claims, Migis succeeded on only one. . . . And, to add insult to injury, her award is dwarfed by the fee awarded her

attorney. . . . Obviously, something is amiss. *Reason*, and *reasonableness*, have been lost in the shuffle." (italics in original)).

In addition, the time spent by Harman's counsel in pursuing his claim at trial cannot be considered reasonable. By the time his case went to trial, Harman only had one remaining viable claim for which he sought to recover, *at most*, $39,000 in economic damages and $30,000 in emotional distress damages. Pet. App. 47. But Harman's counsel ran up over $247,000 in fees preparing for trial. Pet. App. 103. In allowing Harman's counsel to recover fees for all of the time spent for the trial, the court below failed to consider whether the hours expended by counsel were reasonable in light of the small potential recovery. As numerous courts have explained, attorneys "should not be permitted to run up bills that are greatly disproportionate to the ultimate benefits that may be reasonably attainable." *Copeland v. Marshall*, 641 F.2d 880, 908 (D.C. Cir. 1980) (en banc) (MacKinnon, J., concurring); *Gumbhir*, 157 F.3d at 1146 (holding that it was unreasonable for an attorney to "run up a bill of $450,000 to $500,000" to litigate a damages claim where plaintiff could have recovered "$50,000 to $75,000 at most"); *Cole*, 169 F.3d at 488 ("Commitment of $85,000 in legal time to a claim with an expected value well below $50,000 was unreasonable both *ex ante* and *ex post*."); *McGinnis*, 51 F.3d at 810 ("[N]o reasonable person would pay lawyers $148,000 to win $34,000."). Because no reasonable client would have paid $247,000 to take a case to trial with the

hope of recovering $70,000 at most, the statutory attorneys' fees awarded for the trial in this case cannot be considered reasonable. *Cf. Hensley*, 461 U.S. at 434 (noting that billing judgment is important in statutory attorneys' fee cases because "[h]ours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority" (emphasis in original)).

The fact that a lower court felt "compelled" to affirm the extravagant fee award here – an award that is out of all proportion to the damages and the modest public benefit of the case – demonstrates that additional guidance is needed to resolve the dispute among the circuit courts over whether a fee request is presumptively unreasonable if it is grossly disproportionate to the damages recovered.

II. GROSSLY DISPROPORTIONATE ATTORNEYS' FEE AWARDS CREATE WINDFALLS FOR ATTORNEYS AT SIGNIFICANT COST TO GOVERNMENTS AND PRIVATE LITIGANTS.

This case is also worthy of review because its enormously disproportionate fee award in a modest, individual civil rights case creates a strong incentive for civil rights plaintiffs' attorneys to overlitigate civil rights cases in the hopes of securing a similar windfall for themselves. Such litigious zeal comes at a significant cost to local governments which, forced to litigate claims they would rather reasonably settle,

face increased costs for their own defense as well as for their opponents' fees.[7]

To be sure, vindicating civil rights is socially as well as personally important. And the promise of attorneys' fees for prevailing plaintiffs is critical to the efficacy of the civil rights laws because it ensures that plaintiffs will be able to secure competent counsel even for low-value cases. *Ustrak v. Fairman*, 851 F.2d 983, 989 (7th Cir. 1988) (Posner, J.). But "as Judge Posner [has] also recognized, there is an equally strong civic value in discouraging civil rights claims from being overlitigated in disproportion to the dollars and constitutional interests at stake and 'in the process inflicting heavy costs on [the government] opponent(s) . . . '." *Choate v. County of Orange*, 86 Cal.App.4th 312, 325-326 (Cal. App. 2000) (quoting *Hyde v. Small*, 123 F.3d 583, 585 (7th Cir. 1997)); *see also Migis*, 135 F.3d at 1049 (Barksdale, J., concurring in part and dissenting in part) (describing "overreaching Title VII litigation and concomitant fee awards" as "an ever-expanding, ever-growing, ever-devouring two-headed monster"). If a statutory fees provision is not applied evenhandedly and with an eye

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[7] The City recognizes that nominal or very small value cases or cases in which injunctive relief is obtained for the public benefit are rightly excepted from the otherwise strong concern for proportionality. "It is precisely in cases when Plaintiff has no realistic expectation of substantial monetary damages that fees under the Act are required to attract an attorney to handle the case." *Lewis v. Kendrick*, 944 F.2d 949, 955 (1st Cir. 1991).

toward countervailing policy concerns, it creates as many problems as it solves.

Awarding Harman's attorneys $1.1 million in fees – 36 times the damages claim – does just that. Wildly disproportionate awards like Harman's only encourage other plaintiffs' attorneys to overstate their claims, overvalue their cases, litigate expansively, avoid settlement and bank – apparently correctly – on a rich fee award at the end. *See Cole*, 169 F.3d at 489 ("Exaggerated [attorneys' fee] claims impede settlement and consume scarce judicial resources.").

Even where the plaintiff only has a moderate-value personal damages claim, it is far more difficult to settle the case for any amount reasonably related to plaintiff's actual damages than it might have been before the attorneys' fees had grown large. Unless the damages claim is almost sure to lose, it makes more sense for plaintiffs to take the case to trial to gamble for their attorneys' fees. And the higher the potential jackpot, the more tempting the gamble.

That is why this case is particularly troubling and particularly important. While it is true that appellate decisions concerning excessive fee awards are not apt to create a square circuit split given the unique factual circumstances presented in each case, review is warranted here because the only way limits will be imposed on the lower courts on this important question of federal law is through clear guidance from this Court. *Cf. BMW of N. Am. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). Left

unreviewed, this case and others like it will skew the incentives in civil rights cases toward litigation and away from settlement, and elevate the value of individual damages claims beyond their true worth. The only beneficiaries in such a situation are plaintiffs' attorneys. Taxpayers, businesses, and in some cases even civil rights plaintiffs, pay the price.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ALLEN HARMAN, Plaintiff and Respondent, v. CITY AND COUNTY OF SAN FRANCISCO, Defendant and Appellant.	A115519 (San Mateo County Super. Ct. No. 411379) (Filed Dec. 21, 2007)

This case has returned to us yet again for another review of the trial court's award of attorney fees. We conclude the award is not an abuse of discretion, with the exception of the fees for work performed in the prior appeal on the issue of the attorney fees. We therefore reverse that part of the judgment and remand the case for limited proceedings to reduce the award accordingly. In view of the broad discretion granted to the trial court we are constrained to affirm the award of attorney fees in all other respects.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

This case began in the federal court in September of 1999, when respondent Allen Harman and two other White males, Stefan Cheresnik and John McGoldrick, who were employed as airfield safety officers at the San Francisco International Airport, filed a complaint which alleged employment discrimination. After lengthy federal court proceedings the parties stipulated to dismissal of the federal action in favor of a new complaint to be filed in state court. The complaint filed in state court against defendants, City and County of San Francisco, individual members of the San Francisco Airport Commission, and the director of the San Francisco International Airport,[2] initially sought only equitable relief, but was later amended to include a cause of action for damages. "The first three causes of action of the first amended complaint alleged discrimination on the basis of race and sex in violation of Proposition 209 (Cal. Const., art. I, § 31) and the equal protection clause of the Fourteenth Amendment to the United States Constitution and sought prospective equitable relief through an injunction, declaratory judgment,

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[1] Much of our recitation of the underlying facts will be taken directly from our prior opinion in *Harman v. City and County of San Francisco* (2006) 136 Cal.App.4th 1279 [39 Cal.Rptr.3d 589] (*Harman*).

[2] Hereafter collectively referred to as the City or appellant.

and writ of mandate commanding the City 'to implement race- and sex-neutral recruitment, hiring, and promotional policies.' The fourth cause of action sought damages under Proposition 209 and the federal Civil Rights Act as codified in title 42 United States Code section 1983 (hereafter section 1983)." (*Harman, supra,* 136 Cal.App.4th 1279, 1286-1287.)

"The trial court sustained the City's demurrer to the fourth cause of action, as it stated a claim of damages under Proposition 209, on the ground that it did not allege compliance with the government claims act. (Gov. Code, § 905 et seq.) After completion of discovery, the court granted the City's motion for summary judgment on the remaining causes of action and the plaintiffs appealed." (*Harman, supra,* 136 Cal.App.4th 1279, 1287.)

In our opinion in the first appeal in this case (*Cheresnik v. City and County of San Francisco* (Apr. 23, 2003, A098415) [nonpub. opn.]), we reversed that portion of the judgment that dismissed Harman's fourth cause of action for damages under section 1983, but affirmed the judgment as to all other plaintiffs and causes of action. We found that "the City adopted an equal employment opportunity plan in July 2000 that stated policies consistent with evolving legal standards of employment discrimination under equal protection jurisprudence and Proposition 209.[1] We found 'no basis in the record to question the Airport's commitment to conform to changing legal standards in the area of employment policy.' We also affirmed the summary judgment with respect to the

claims of damages of two of the three defendants. In the case of Harman, we affirmed the demurrer to the claim for damages under Proposition 209, but we found a triable issue of fact relating to his claim of damages under section 1983 arising from a delay in receiving a promotion to the job classification of '9220 Airport Operations Supervisor.'"[3] (*Harman, supra,* 136 Cal.App.4th 1279, 1287, fn. omitted.) "In reversing the dismissal of Harman's section 1983 claim," our finding of a triable issue of fact related to the "racially discriminatory purpose in the termination of the provisional pool and the acting appointment." (*Ibid.*)

Following our remand, the trial court denied the City's motion for nonsuit. Settlement negotiations produced a demand for $600,000 in damages from Harman; the City countered with an offer of $25,000. Trial then proceeded before a jury. The jury found in a special verdict form "that the City had 'an official policy or custom to intentionally discriminate against [W]hite males in promotional opportunities at the

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[3] "The complaint originally attacked three personnel decisions: the termination of a pool of eligible candidates for a provisional appointment, the appointment of an acting supervisor for a 90-day period in April 1999, and the permanent appointment of airport operating supervisors through the normal civil service procedure. Since Harman received a permanent promotion as airport operations supervisor in May 2000, his claim for damages was necessarily restricted to the other two personnel decisions." (*Harman, supra,* 136 Cal.App.4th 1279, 1287.)

San Francisco International Airport.' The jury then awarded Harman $15,300 as damages for economic harm and another $15,000 as damages for emotional distress. The City moved for judgment notwithstanding the verdict and for new trial relying chiefly on a claim of [*Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658 [56 L.Ed.2d 611, 98 S.Ct. 2018]] error. The trial court denied the motions and entered judgment for Harman." (*Harman, supra,* 136 Cal.App.4th 1279, 1288.)

"Harman then filed two motions for attorney fees under 42 United States Code section 1988 in the total amount of $1,095,202. He sought $713,152.75 on behalf of the Pacific Legal Foundation, which filed the original action, and $382,050.23 for trial counsel, Andrea Miller. The trial court awarded the entire sum finding that it was 'reasonable, after due consideration of the success obtained relative to the relief sought and other circumstances of this case.' The City filed a timely notice of appeal." (*Harman, supra,* 136 Cal.App.4th 1279, 1288.)

In our opinion in *Harman, supra,* 136 Cal.App.4th 1279, 1317, we affirmed the judgment for $30,300 in compensatory damages, but vacated the award of attorney fees. We concluded "that the trial court did not properly consider the standards governing the award of attorney fees under section 1988" as articulated in *Hensley v. Eckerhart* (1983) 461 U.S. 424 [76 L.Ed.2d 40, 103 S.Ct. 1933]. (*Harman, supra,* at p. 1316.) We again remanded the case "to give the court an opportunity to consider the determination of a

reasonable fee." (*Ibid.*) We advised the trial court to "recalculate the lodestar figures applying the proper standards of reasonableness. Then, it must adjust the fee to reflect the plaintiff's limited success by pursuing the two-step analysis dictated by *Hensley*. First, it should exclude hours expended on claims that are unrelated to the claim of damages on which Harman succeeded at trial. Secondly, it must reduce the award to reflect the limited nature of Harman's relief in comparison with the scope of the litigation as a whole. As instructed by *Hensley*, the court 'may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success.' [Citation.] When it recalculates the attorney fee award, the court must articulate a clear explanation of its reasoning in light of the authority surveyed in this opinion so as to facilitate meaningful appellate review. We express[ed] no opinion as to the amount of fees that the court should award. That amount [was] left to the trial court's sound discretion to be exercised in view of the governing standards we have set forth." (*Harman, supra,* at pp. 1316-1317.)

Once the case returned to the trial court, the City filed a peremptory challenge to the trial judge (Code Civ. Proc., § 170.6).[4] Along with opposition to the

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[4] The trial court never expressly ruled upon respondent's peremptory challenge. Although appellant has brought our attention to the lack of a ruling on the peremptory challenge, no

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peremptory challenge, Harman filed a renewed request for attorney fees in the total amount of $1,118,457.75: $744,756.75 for the Pacific Legal Foundation (PLF), and $373,701 for Andrea Miller. The requested fees included amounts for work performed posttrial and on appeal, and purported to exclude amounts for hours expended on unsuccessful claims. As ordered by the trial court, the parties submitted memoranda on the issue of the reasonable amount of attorney fees.

In its order awarding attorney fees after remand, the trial court considered first the issue of the lodestar calculation. The court found that reasonable billing judgment was exercised by respondent's attorneys in preparing the billing summaries, and appellant failed to satisfy its burden to prove that the "presumptively reasonable" lodestar figure was erroneous. The rates presented by respondent's attorneys in the lodestar calculations were found to be "supported by the evidence in the declarations submitted in support of the attorneys['] fees award."

The trial court proceeded in detailed fashion to the two-step *Hensley* test: a "determination of related and unrelated claims and concerning adjustments to the lodestar based on *Hensley*." The court reviewed deletions made by respondent from fee submissions for time related to the cases "of the other two original

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review of the court's failure to act on the challenge has been sought.

plaintiffs" and the federal and state court equitable claims. The deletions were considered by the court as an adjustment of the first-step "lodestar" figure and a concession by respondent that to that extent "the equitable claims and the cases brought by the other two original plaintiffs were unrelated." With respondent's concessions in mind, the court then evaluated the specific "intermingled time on unrelated claims" that remained "in the initial lodestar calculation." Respondent's reductions were found "reasonable" and a proper accounting for all fees for claims unrelated to the "overall success" in the case.

The court then determined that any additional reduction in the fee award in the second step of the *Hensley* test "would amount to doubly reducing fees" for the "limited success" in the case. The court specifically found that respondent's "lack of success" was "incrementally accounted for" in the deletions, and therefore "decline[d] to reduce the lodestar figure further." Additional fees of $144,170 were also awarded for time "associated with the appeal and for the remand proceeding," with a deduction for the rehearing proceeding that was "an unnecessary and unsuccessful step in the litigation." Attorney fees in the total amount of $1,113,905.40 were awarded to respondent by the trial court. This third appeal in the case followed.

DISCUSSION

In this appeal we are confronted with the taxing problem of determining the reasonableness of an attorney fee award that far exceeds the monetary award recovered at the end of protracted and hard-fought litigation. The lodestar method that is used in section 1983 fee requests is so fraught with subjective factors that its real-life application is not easily reduced to the mathematical precision the method seems to invite. (*See Arbor Hill Concerned Citizens v. County of Albany* (2d Cir. 2007) 493 F.3d 110, 117.) Application of the lodestar method in this case also comes at a time when the trial court and the parties have the benefit of hindsight of over seven years of litigation. In this era of ever increasing legal fees and costs, few would claim to have the prescient abilities necessary to predict the final outcome of this litigation that started in 1999. With these observations, we proceed with our analysis, mindful of the broad discretion that is required to be accorded to the trial court.

Appellant claims that the attorney fee award is excessive, particularly when compared to the "limited success" of respondent in the "litigation as a whole." Although appellant challenges various aspects of the trial court's attorney fee award, its primary argument is that the attorney fee award simply has no proper "measure of proportionality" to the recovery of compensatory damages by respondent. The City maintains that "in light of Harman's extraordinarily limited success" in the case, "an award of $1.1 million

on a recovery of $30,300 is totally out of line with the case law" cited in *Harman.* The City requests that we "simply reduce" the attorney fee award to $90,900, which represents an appropriate figure of "three times the amount" of recovery of damages by Harman. In the alternative, the City proposes that we undertake a reduction "to properly eliminate time billed for the unsuccessful claims," before and after our first opinion in the case that finally eliminated all the claims other than Harman's section 1983 action for damages, and on appeal.

In *Harman* we articulated at some length the essential guidelines that govern attorney fee awards to partially prevailing plaintiffs under section 1988, and we reiterate them as pertinent here. First the "lodestar" figure is "'calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. [Citation.] Adjustments to that fee then may be made as necessary in the particular case.' [Citation.]" (*Harman, supra,* 136 Cal.App.4th 1279, 1307.) The court "assesses whether it is necessary to adjust the presumptively reasonable lodestar figure on the basis of the *Kerr* [*v. Screen Extras Guild, Inc.* (9th Cir. 1975) 526 F.2d 67, 69-70] factors that are not already subsumed in the initial lodestar calculation." (*Morales v. City of San Rafael* (9th Cir. 1996) 96 F.3d 359, 363-364, fns. omitted.)[5] "'The purpose of such adjustment is to fix a

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[5] The 12 factors that may be considered to adjust the lodestar figure include: "(1) the time and labor required; (2) the

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fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services.' [Citations.]" (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 154 [50 Cal.Rptr.3d 273][6]; see also *Ketchum v. Moses* (2001) 24 Cal.4th

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novelty and difficulty of the questions [involved]; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." (*Blanchard v. Bergeron* (1989) 489 U.S. 87, 91, fn. 5 [103 L.Ed.2d 67, 109 S.Ct. 939]; see also *Cunningham v. County of Los Angeles* (9th Cir. 1988) 879 F.2d 481, 487; *Kerr v. Screen Extras Guild, Inc., supra,* 526 F.2d 67, 69-70; *Johnson v. Georgia Highway Express, Inc.* (5th Cir. 1974) 488 F.2d 714, 717-719.)

[6] While *Graciano* was an action brought under the California Automobile Sales Finance Act and the Consumer Legal Remedies Act, the court used the *Hensley* standards for determining appropriate apportionment in the context of an attorney fee award to a partially prevailing party. (*Graciano v. Robinson Ford Sales, Inc., supra,* 144 Cal.App.4th 140, 153.) The courts have also applied the *Hensley* and *Harman* apportionment standards – or the equivalent – to resolve attorney fee disputes in SLAPP cases (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 343-344 [42 Cal.Rptr.3d 607]; *Computer-Xpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1018 [113 Cal.Rptr.2d 625]), in cases pursued under the Fair Employment

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1122, 1132 [104 Cal.Rptr.2d 377, 17 P.3d 735].) "Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 [95 Cal.Rptr.2d 198, 997 P.2d 511].)

Hensley "instructs that the initial lodestar calculation should exclude 'hours that were not "reasonably expended"'" in pursuit of successful claims. (*Harman, supra,* 136 Cal.App.4th 1279, 1310, quoting *Hensley v. Eckerhart, supra,* 461 U.S. 424, 434.) "If questioned charges are included in the initial lodestar calculation, they are then subject to challenge under *Hensley* as being unrelated to the plaintiff's successful claims. . . . *Hensley* directs the court to consider whether the plaintiff failed 'to prevail on claims that were unrelated to the claims on which he succeeded?' [Citation.] Counsel's work on such unsuccessful and unrelated claims 'cannot be deemed to have been "expended in pursuit of the ultimate result achieved["] . . . and therefore no fee may be awarded for services [on such claims].' [Citation.] The court recognizes that 'there is no certain method of determining when

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and Housing Act (FEHA) (*Beaty v. BET Holdings, Inc.* (9th Cir. 2000) 222 F.3d 607, 610), and in cases of awards made under Civil Code section 1717 (*Wood v. Santa Monica Escrow Co.* (2007) 151 Cal.App.4th 1186, 1190 [60 Cal.Rptr.3d 597]; *Del Cerro Mobile Estates v. Proffer* (2001) 87 Cal.App.4th 943, 951 [105 Cal.Rptr.2d 5]).

claims are "related" or "unrelated,"' [citation] but it instructs the court to inquire whether the 'different claims for relief . . . are based on different facts and legal theories.' [Citation.] If so, they qualify as unrelated claims." (*Harman, supra,* at pp. 1310-1311.)

Conversely, "'Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed.' [Citation.] 'Attorneys fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories.' [Citation.] Apportionment is not required when the issues in the fee and nonfee claims are so inextricably intertwined that it would be impractical or impossible to separate the attorney's time into compensable and noncompensable units." (*Graciano v. Robinson Ford Sales, Inc., supra,* 144 Cal.App.4th 140, 158-159.)[7]

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[7] "[T]he favored procedure is for the district court to consider the extent of the plaintiff's success in making its initial determination of hours reasonably expended at a reasonable rate, and not in subsequent adjustments to the lodestar figure." (*Gates v. Deukmejian* (9th Cir. 1992) 987 F.2d 1392, 1404.) "Adjusting the lodestar on the basis of subsumed reasonableness factors after the lodestar has been calculated, instead of adjusting the reasonable number of hours or reasonable hourly rate at the first step, i.e. when determining the lodestar, is a disfavored procedure. [Citation.] However, as long as the district court only makes one adjustment per factor, either before or after the lodestar calculation," the error is harmless. (*Morales v. City of San Rafael, supra,* 96 F.3d 359, 364, fn. 9.)

If successful and unsuccessful claims are found to be *related,* the second step of the two-part analysis in limited success cases requires the court to still evaluate the "significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." (*Hensley v. Eckerhart, supra,* 461 U.S. 424, 435.) If the plaintiff obtained "excellent results," full compensation may be appropriate. (*Ibid.*) If there was only "partial or limited success," full compensation "may be . . . excessive." (*Id.* at p. 436.) Where "'the plaintiff achieved only limited success,'" the court "'should award only that amount of fees that is reasonable in relation to the results obtained.' [Citation.] In conducting this analysis, a court 'may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success.' [Citation.]" (*Mann v. Quality Old Time Service, Inc., supra,* 139 Cal.App.4th 328, 343, italics omitted.) In this step of the *Hensley* analysis, "The trial court 'should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.' [Citation.] The court may appropriately reduce the lodestar calculation 'if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.' [Citation.] The decision emphasized, 'the most critical factor is the degree of success obtained.' [Citation.]" (*Harman, supra* 136 Cal.App.4th 1279, 1312.)

As we also noted in *Harman,* our review of the award is severely constrained. "We review the trial

court's award of attorney fees under section 1988 for an abuse of discretion." (*Robbins v. Regents of University of California* (2005) 127 Cal.App.4th 653, 665 [25 Cal.Rptr.3d 851].) "'"[T]he appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason."' [Citations.]" (*Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375, 1388 [34 Cal.Rptr.3d 368].) "'We review the entire record, attentive to the trial court's stated reasons in denying [or granting] the fees and to whether it applied the proper standards of law in reaching its decision. . . . ' [Citation.]" (*Wal-Mart Real Estate Business Trust v. City Council of San Marcos* (2005) 132 Cal.App.4th 614, 620 [33 Cal.Rptr.3d 817].) "If it did, we then determine whether the application of that standard to the facts was within the scope of its discretion under the statute." (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 83 [24 Cal.Rptr.3d 72]; see also *Punsly v. Ho* (2003) 105 Cal.App.4th 102, 113 [129 Cal.Rptr.2d 89].) We defer to the trial court's discretion "because of its 'superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.' [Citation.]" (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 324 [103 Cal.Rptr.2d 339].) The California Supreme Court has explained "'The "experienced trial judge" is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong' – meaning that it

abused its discretion. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49 [141 Cal.Rptr. 315, 569 P.2d 1303]; *Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 228 [168 Cal.Rptr. 525] [an appellate court will interfere with a determination of reasonable attorney fees 'only where there has been a manifest abuse of discretion']." (*PLCM Group, Inc. v. Drexler, supra,* 22 Cal.4th 1084, 1095 [95 Cal.Rptr.2d 198, 997 P.2d 511]; see also *Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 777 [118 Cal.Rptr.2d 629].)

I. The Lack of Proportionality Between the Compensatory Damages Recovered by Harman and the Award of Attorney Fees.

We first consider appellant's contention that the palpable disparity between the damages ultimately recovered by respondent and the $1,113,905.40 award of attorney fees alone demands reversal of the judgment. The case commenced with the claims of three plaintiffs for equitable relief to end discriminatory employment practices by the City and implement race- and sex-neutral recruitment, hiring, and promotional policies, but was subsequently amended to include causes of action for damages under Proposition 209 and section 1983. Of these multiple legal and equitable claims by multiple parties, only the damages claim of Harman survived to reach trial, and after his $600,000 settlement demand only $30,300 was awarded by the jury as compensatory damages for the delay in his promotion. We thus acknowledge

the obvious: the damages obtained by respondent are quite disproportionate to the award of attorney fees.

The law does not mandate, however, that attorney fees bear a percentage relationship to the ultimate recovery of damages in a civil rights case. (*Harrington v. City of Napa* (N.D.Cal. Dec. 12, 2005, Civ. No. C-04-0958) 2005 U.S.Dist. Lexis 32341, 17.) "There is no precise formula for determining the extent to which a party has prevailed." (*LeMaire v. Maass* (9th Cir. 1993) 12 F.3d 1444, 1461.) "[T]he Supreme Court has not adopted a rule that measures a fee award by a proportion of the damages awarded." (*System Management, Inc. v. Loiselle* (D.Mass. 2001) 154 F.Supp.2d 195, 200, citing *Riverside v. Rivera* (1986) 477 U.S. 561 [91 L.Ed.2d 466, 106 S.Ct. 2686].) "Instead, the court must consider the significance of the overall relief obtained by the prevailing party in relation to the hours reasonably expended on the litigation and whether the expenditure of counsel's time was reasonable in relation to the success achieved." (*Mann v. Quality Old Time Service, Inc., supra,* 139 Cal.App.4th 328, 344.) The "'most critical factor'" in assessing the proper amount of attorney fees to award a prevailing party under 42 United States Code section 1988 is not strict proportionality, but rather the "'degree of success obtained'" by the plaintiff. (*Harman, supra,* 136 Cal.App.4th 1279, 1312, quoting from *Hensley v. Eckerhart, supra,* 461 U.S. 424, 436.)

When assessing the reasonableness of an attorney fee award under 42 United States Code section

1988, the concepts of "degree of success" and direct "proportionality" are distinguishable. We recognized in *Harman* that the plurality opinion in *Riverside v. Rivera, supra,* 477 U.S. 561, 574, "rejected 'the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers.'" (*Harman, supra,* 136 Cal.App.4th 1279, 1313.) The court in *Riverside* endorsed instead a flexible approach to lodestar calculations that takes into account all considerations relevant to the reasonableness of the time spent. [*Riverside v. Rivera, supra,* at pp. 573-580] (opinion of Brennan, J.); accord *id.* at [p. 585] (Powell, J., concurring in the judgment) (rejecting strict rule of proportionality because 'the facts and circumstances of litigation are infinitely variable'); *id.* at [p. 595] (Rehnquist, J., dissenting) ('I agree with the plurality that the importation of the contingent-fee model to govern fee awards under § 1988 is not warranted by the terms and legislative history of the statute')." (*Cunningham v. County of Los Angeles, supra,* 879 F.2d 481, 486.) "While degree of success is critical in determining the amount of a fee award, [citation] proportionality is no longer an issue once the prevailing party has separated the wheat from the chaff (i.e., isolated the time spent on her successful claim or claims)." (*Gay Officers Action League v. Puerto Rico* (1st Cir. 2001) 247 F.3d 288, 296.)

"'A rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting

[42 United States Code section] 1988. Congress enacted [42 United States Code section] 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. [Citation.] These victims ordinarily cannot afford to purchase legal services at the rates set by the private market. . . . Moreover, the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries.' [Citation.] 'A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts.'" (*Graciano v. Robinson Ford Sales, Inc., supra,* 144 Cal.App.4th 140, 164, quoting *Riverside v. Rivera, supra,* 477 U.S. 561, 576-578.) Further, "a unifactor approach tying the number of hours accepted as reasonable" solely to the proportion of damages recovered "would be inconsistent with the statutory mandate that district courts exercise discretion by considering *all* factors relevant to reasonableness." (*Cunningham v. County of Los Angeles, supra,* 879 F.2d 481, 486.)

The "'amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded under § 1988. It is, however, only one of many factors that a court should consider in

calculating an award of attorney's fees. . . . ' [Citation.]" (*Butler v. Dowd* (8th Cir. 1992) 979 F.2d 661, 676.)" There is no requirement of proportionality of fees sought to verdict though the court in its discretion may consider plaintiff's success in determining the reasonableness of fees. [Citations.] A rule of proportionality that would limit fee awards under section 1988 to a proportion of the damages recovered in the underlying suit is inconsistent with the flexible approach to lodestar calculations that takes into account all considerations relevant to the reasonableness of the time spent." (*Oberfelder v. City of Petaluma* (N.D.Cal. Jan. 29, 2002, Civ. No. C-98-1470 MHP), 2002 U.S. Dist. Lexis 8635, 12.) "[W]e do not reflexively reduce fee awards whenever damages fail to meet a plaintiff's expectations in proportion to the damages' shortfall." (*Nigh v. Koons Buick Pontiac GMC, Inc.* (4th Cir. 2007) 478 F.3d 183, 190.)

Nor are we persuaded to adopt the City's mathematical proposal to cap the fee award at a figure that represents a ratio of three times the damages recovered. (*Hensley v. Eckerhart, supra,* 461 U.S. 424, 435, fn.11; *Gates v. Deukmejian, supra,* 987 F.2d 1392, 1404; *Greater Los Angeles Council on Deafness v. Community Television* (9th Cir. 1987) 813 F.2d 217, 222.) "The Supreme Court has disapproved on more than one occasion of such pretensions to mathematical precision." (*Cunningham v. County of Los Angeles, supra,* 879 F.2d 481, 485.) "'[S]uch a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors.' [Citation.]" (*Ibid.*) We

therefore conclude that the award of attorney fees is not subject to reversal simply because it lacks definitive proportionality to the amount of damages recovered by respondent. There is "no mathematical rule requiring proportionality between compensatory damages and attorney's fees awards, see *City of Riverside v. Rivera,* 477 U.S. 561, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986), and courts have awarded attorney's fees where plaintiffs recovered only nominal or minimal damages. See e.g., *Pollock v. Baxter Manor Nursing Home,* 716 F.2d 545, 547 (8th Cir. 1983) (upholding award of $ 50,000 in attorney's fees where plaintiff recovered $ 1.00 nominal damages); *Milwe v. Cavuoto,* 653 F.2d 80, 84 (2d Cir. 1983) (directing award of 'reasonable' attorney's fees where plaintiff recovered $ 1.00 in nominal damages on constitutional claim and 'substantial' compensatory damages on pendent state law claims); *Allen v. District of Columbia,* 503 A.2d 1233 (D.C. App. 1986) (ordering award of 'reasonable' attorney's fees where plaintiff recovered nothing on constitutional claim and $ 3,000 on pendent state law claim)." (*Thompson v. International Asso. of Machinists & Aerospace Workers* (D.D.C. 1987) 664 F. Supp. 578, 581.)

II. The Adjustments Made by the Trial Court.

We proceed to an examination of the adjustments made by the trial court to account for Harman's limited success in the case, with primary emphasis "on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably

expended on the litigation." (*Hensley v. Eckerhart, supra,* 461 U.S. 424, 435; see also *Morales v. City of San Rafael, supra,* 96 F.3d 359, 363; *LeMaire v. Maass, supra,* 12 F.3d 1444, 1461.) As a threshold matter we point out that the trial court followed our directive taken from *Hensley* to "'provide a concise but clear explanation of its reasons for the fee award.'" (*Harman, supra,* 136 Cal.App.4th 1279, 1308, citing *Hensley, supra,* at p. 437; see also *Lopez v. San Francisco Unified School Dist.* (N.D.Cal. 2005) 385 F.Supp.2d 981, 986.) The court also determined in accordance with the first step of *Hensley* that with specified exceptions – many of which were effectively conceded by respondent – counsel's work on unsuccessful claims was related to plaintiff's single successful claim. Appellant complains that "the trial judge did not properly eliminate time spent on unsuccessful claims." Specifically, appellant objects to the trial court's failure to delete as unrelated to the successful claim the "work done on behalf of the two losing plaintiffs, and in pursuit of injunctive relief" for respondent. Appellant also challenges the award of fees "for work done on appeal to defend the original inappropriate $1.1 million fee award." We thus review the trial court's findings on related and unrelated claims – that is, the first step of *Hensley.*

A. The Findings on Related and Unrelated Claims.

The trial court accepted the assumption, based on respondent's billing submissions, that the claims

for equitable relief by the "other two original plaintiffs were unrelated to the successful claim."[8] The court recognized that respondent had already "excised all time expressly related to equitable claims in federal court," but further reduced the award for related time that "could be isolated and excised." The court found that the deleted hours reflected in the submissions by respondent properly accounted for the time spent on unrelated, unsuccessful claims with respect to the summary judgment motion, the appeal, and the federal court action.

In light of the concession that two of the three plaintiffs' claims were unrelated to the single successful damages action of Harman, appellant maintains that the court "should have first reduced all pre-April 23, 2003 billings by two thirds,"[9] then "cut the remainder in half" to account for the unsuccessful equitable claims, and finally "cut the remainder in half again" to reflect that only part of the state law damages claim was successful. Appellant points out that the damages awarded to Harman were limited to the one-year delay in his appointment caused by "the course of conduct of the EEO manager in approving provisional appointments." (See *Harman, supra,* 136 Cal.App.4th 1279, 1311.) Thus, claims the City, much of respondent's attorneys' discovery efforts "did not

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[8] If not for the concession, the court would have found the claims related.

[9] April 23, 2003, is the date the claims of the other plaintiffs were finally removed from the case.

involve these narrow subjects," and should not be included in the attorney fee award. Based upon the proposed "one-third, one-half, one-half" formula, the City submits that the total award for the pre-April 23, 2003 stage of the litigation "should have been $74,833."

For the post-April 23, 2003 billings – that is, following the remand which limited Harman's action to his single claim for damages – the City submits that his recovery of attorney fees should be limited to "one-twentieth of the fees he now seeks for this period." The City's proposed "one-twentieth" formula is based on the fact that Harman recovered ($30,300) only "one-twentieth of what he demanded" ($600,000). The City complains that Harman "incurred $344,678 in fees for a net gain of $5,300" above the "pre-trial settlement offer" of $25,000. For the fees on appeal, the City requests that we deny any fees "incurred in pursuit of the fee award," particularly since "there never would have been an appeal (or a trial for that matter) had Harman and his attorneys taken a reasonable position at settlement."

While percentage reductions may in some cases be appropriate, the adjustments proposed by the City are inconsistent with the very expansive *Hensley* standard of related and unrelated claims. As we remarked in *Harman, supra,* 136 Cal.App.4th 1279, 1310-1311, under *Hensley,* although "'there is no certain method of determining when claims are "related" or "unrelated,"'" the essential inquiry is "whether the 'different claims for relief . . . are based

on different facts and legal theories.' [Citation.] If so, they qualify as unrelated claims. Conversely, related claims 'will involve a common core of facts or will be based on related legal theories.' [Citation.]" " 'Under this analysis, an unsuccessful claim will be *un*related to a successful claim when the relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised.' [Citations.]" (*Harman, supra,* at p. 1311; see also *Schwarz v. Secretary of Health & Human* [sic] (9th Cir. 1995) 73 F.3d 895, 903; *O'Neal v. City of Seattle* (9th Cir. 1995) 66 F.3d 1064, 1068-1069.)

Thus, rather than follow a formulaic reduction based on the number and percentage of unsuccessful claims, as the City seems to suggest, we must examine the nature and "course of conduct" upon which the claims are based, as did the trial court. (*Harman, supra,* 136 Cal.App.4th 1279, 1311.) The trial court characterized the essence of the relief requested as designed "to deter illegal discrimination in promotions at the Airport," and we do not find that characterization to be an abuse of discretion. While in *Harman* we stated that the successful damages claim was limited in its scope to the policy decision on approval of provisional appointments, the entire course of conduct that respondent attempted to remedy may be more broadly defined to include the City's discriminatory employment practices and policies. And, the effort to prove racially discriminatory purposes

associated with his provisional appointment shared a common core of facts and legal theories with the employment practices that governed permanent appointments, at least for purposes of the vast majority of the hours of service expended by counsel.

Also, the trial court's determination that the various claims against the City were inextricably intertwined, "making it 'impracticable, if not impossible, to separate the multitude of conjoined activities into compensable or noncompensable time units,'" is reasonably based upon the evidence in the record. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111 [51 Cal.Rptr.2d 286], quoting *Fed-Mart Corp. v. Pell Enterprises, Inc., supra,* 111 Cal.App.3d 215, 227.) For the hours billed both before and after the remand on April 23, 2003, where the court could isolate the time spent on the individual claims, the fees were properly excised. Where the court considered the fees intertwined, the successful and unsuccessful claims were found related, as *Hensley* directs. For instance, the court approved of the reductions submitted by respondent's counsel for work done "on behalf of the other two plaintiffs," and imposed further reductions of time by one-quarter, although the court noted that the "vast majority of the work" would have "been necessary if Harman had been the only plaintiff." We conclude that the trial court did not abuse its discretion by determining that, with the exception of the reductions made, the attorney time expended through trial to pursue the remainder of the action was related to the time that

reasonably contributed to the successful resolution of the damages claim, and declining to further apportion the attorney fee award. (*Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1085-1086 [25 Cal.Rptr.3d 39]; *Hospital Systems, Inc. v. Office of Statewide Health etc. Development* (1994) 25 Cal.App.4th 1686, 1692 [30 Cal.Rptr.2d 922].)

As to the fees awarded for work done on the prior appeal in *Harman* and after judgment in the total amount of $144,170.00, the court properly deleted the hours spent by the attorneys for the Pacific Legal Foundation on the unsuccessful petition for rehearing; the remaining time was not apportioned in any way.[10] The attorneys for Harman submitted billing entries which indicated that specific time was spent on the "merits" of the appeal, or on the attorney fee issue, or were "combined efforts" on both issues. While those designations were made, fees were nevertheless requested by respondent and billings were submitted for time spent on the unsuccessful issue on appeal of the propriety of the previous attorney fee award. Nothing in the record indicates that either the attorneys or the trial court excised entries that related solely to the attorney fee issue which resulted in a reversal of the first attorney fee award. On that separate, unrelated issue in the prior appeal respondent did not prevail. Respondent is incorrect

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[10] We asked the parties to submit supplemental briefing on the issue of apportionment of the fees related to the prior appeal, and they have done so.

when he asserts that the attorney fee award was not reversed in the *Harman* decision. The award of attorney fees in respondent's favor was vacated in its entirety and the case was remanded with directions for the trial court to consider anew "the determination of a reasonable fee." (*Harman, supra,* 136 Cal.App.4th 1279, 1316.) The reversal of the attorney fee award and remand to the trial court for further proceedings means that on that issue of the appeal respondent was not the prevailing party. (See *Corder v. Gates* (9th Cir. 1996) 104 F.3d 247, 249-250.) The appeal, like the underlying action, was one in which limited success was realized. Thus, the failure of the trial court to make any effort to apportion the award of attorney fees on appeal to account for time spent on the unrelated and unsuccessful attorney fees claim in the prior appeal was error under *Hensley.* The remainder of the award for work done on the appeal and following the remand, including the billing submissions for " combined efforts" which were intertwined with the successful claim on appeal, was not an abuse of discretion.

B. Reductions for Degree of Success.

The second step of the *Hensley* analysis focuses upon whether additional adjustments in the fee award must be made to account for the partial degree of success achieved. "[U]nder *Hensley,* a partially prevailing party is not necessarily entitled to all incurred fees even where the work on the successful and unsuccessful claims was overlapping." (*Mann v.*

Quality Old Time Service, Inc., supra, 139 Cal.App.4th 328, 344.) "[T]he court makes further reductions when plaintiffs' success on any remaining interrelated unsuccessful and successful claims was limited." (*Gates v. Deukmejian, supra,* 987 F.2d 1392, 1404.)

The City claims that even if the "time was properly eliminated for the unsuccessful claims, a fee award of $1,113,905.40 was still an abuse of discretion under the second step of *Hensley.*" The City again calls our attention to the profound disparity between the compensatory damages recovered and the attorney fees awarded, and refers to our observation in *Harman, supra,* 136 Cal.App.4th 1279, 1314, that the cases "often display a marked restraint in approving attorney fee awards in amounts that constitute a high multiple of damages."

Here, the trial court exercised its discretion by considering an "adjustment to the lodestar" according to the "second step of *Hensley*" to account for the "lack of overall success." In evaluating the degree of success, the court followed the directions recited in *Harman.* In settling on a reasonable amount of fees, the court specifically expressed awareness that the award was "far greater than the amount of monetary damages awarded." Thus, we cannot find an abuse of discretion based upon the failure of the court to understand or apply the correct legal standards to determine the amount of the award. (Cf., *Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 452 [25 Cal.Rptr.3d 387]; *Flannery v. California Highway*

Patrol (1998) 61 Cal.App.4th 629, 634 [71 Cal.Rptr.2d 632].) "California law allows the trial court to reduce . . . attorneys' fees award based on the results . . . obtained, or not to reduce the fee award, as the trial judge finds is appropriate in the exercise of . . . discretion." (*Beaty v. BET Holdings, Inc., supra,* 222 F.3d 607, 610.)

The court declined to make further adjustments under the second step of *Hensley* for a number of stated reasons. First, the court took into account that the lodestar figure had already been significantly reduced under the first step of the analysis, and determined that additional reductions for lack of success "would amount to doubly reducing the fees." The court also determined that the fee award was "not out of proportion to the overall success and significance of the litigation, and is commensurate to Plaintiff's long, hard-fought struggle for vindication of his constitutional right." Harman's "primary purpose" in pursuing the litigation, the court stated, was to obtain his promotion and prevent the City from continuing to implement the challenged discriminatory employment practices, which the court found occurred "because of Plaintiff's lawsuit." In addition to a "special verdict" from the jury that found the City's policy "intentionally discriminat[ed] against White males in promotional opportunities at the San Francisco International Airport," the court recognized the additional "benefit to the public via the published opinion establishing that employers may not shield themselves against liability for illegal discriminatory

conduct by its employee when it has, in fact, a policy or practice of delegating final decision making authority in the realm of the conduct at issue to that employee."

Finally, in response to our admonition in *Harman, supra,* 136 Cal.App.4th 1279, 1316, to consider "the settlement offer in evaluating the benefit to plaintiff of the attorney's services at trial," the court noted that respondent succeeded on the only count taken to the jury, and "the jury awarded 78% of the highest amount of actual damages requested." For that reason the court declined to reduce the award for Harman's refusal to accept the City's settlement offer and his minimal additional recovery after trial.

We agree with appellant that the trial court somewhat overvalued the "public benefit" conferred by the present action (*Harman, supra,* 136 Cal.App.4th 1279, 1316), but we cannot fault the trial court's ultimate reasoning. The courts have often expressed the principle that a slight monetary recovery will not control assessment of the appropriate amount of attorney fees where a constitutional right is vindicated or a significant public benefit conferred. (See *Riverside v. Rivera, supra,* 477 U.S. 561, 574; *Duckworth v. Whisenant* (11th Cir. 1996) 97 F.3d 1393, 1399, appen.; *Morales v. City of San Rafael, supra,* 96 F.3d 359; *Butler v. Dowd, supra,* 979 F.2d 661, 675-676; *Norman v. Housing Authority of City of Montgomery* (11th Cir. 1988) 836 F.2d 1292, 1302; *Pacific West Cable Co. v. City of Sacramento* (E.D.Cal. 1988) 693 F.Supp. 865, 871-872; *Harman, supra,* 136

Cal.App.4th 1279, 1316; *Choate v. County of Orange, supra,* 86 Cal.App.4th 312, 325.) A "court should not reduce the lodestar merely because the prevailing party did not receive the type of relief that it requested. [Citations.] This is especially true in civil rights cases." (*Gates v. Deukmejian, supra,* 987 F.2d 1392, 1404.) In "civil rights cases" such as this one which seek to vindicate important public interests whose value transcends the ultimate dollar amounts awarded to civil rights claimants in compensation, "a trial court does not under California law abuse its discretion simply by awarding fees in an amount higher, even very much higher, than the damages awarded," where successful litigation causes conduct which the civil rights statutes were enacted to deter to be exposed and corrected. (*Beaty v. BET Holdings, Inc., supra,* 222 F.3d 607, 612-613, citing *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 445 [94 Cal.Rptr.2d 143].)[11] "Thus, 'a plaintiff who failed to recover damages but obtained injunctive

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[11] *Beaty v. BET Holdings, Inc.* and *Vo v. Las Virgenes Municipal Water Dist.* were cases brought under the FEHA. In *Vo,* the jury found that the defendant was liable for harassment based on race, awarding the plaintiff $40,000 in compensatory damages, an amount later reduced to $37,500 by stipulation. The trial court then awarded the plaintiff $470,000 in attorney fees. Despite the fact that the fee award was more than 10 times greater than the plaintiff's damages, the court concluded that the fee was justified because the defendant took a rigid non-settlement posture, and because the award served the FEHA's objectives of exposing and deterring discrimination. (79 Cal.App.4th 440, 445, 448.)

relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time.' [Citation.]" (*Gates, supra,* at p. 1404, fn. 13.)

Although if the decision had been presented to us in the first instance we may not have awarded attorney fees that so far exceed the recovery of damages, neither do we find it an abuse of discretion. The trial court here presided over the entire lengthy proceedings, including two remands after prior appeals, and undertook a thorough, considered evaluation of the value of the legal services provided. "[S]ince the trial judge was presumably in the best position to determine the value of the services rendered by counsel, ' . . . we may not disturb the judge's decision on this point unless we are convinced it was clearly wrong.'" (*Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 622 [98 Cal.Rptr.2d 388].) "The court may consider the nature of the litigation, its difficulty, the amount involved in the litigation, the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, the attorney's learning and experience, the intricacies and importance of the litigation, the labor necessary, and the time consumed. [Citation.] We will reverse only if the amount awarded is so large or small that we are convinced it is clearly wrong." (*Olson v. Cohen* (2003) 106 Cal.App.4th 1209, 1217 [131 Cal.Rptr.2d 620].) "The abuse-of-discretion standard requires us to uphold a ruling which a reasonable judge might have made, even though we would not have ruled the

same and a contrary ruling would also be sustainable. We cannot substitute our own judgment." (*People v. Woods* (1993) 12 Cal.App.4th 1139, 1153 [15 Cal.Rptr.2d 906]; see also *Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 864 [112 Cal.Rptr.2d 239].) "The only proper basis of reversal of the amount of an attorney fees award is if the amount awarded is so large or small that it shocks the conscience and suggests that passion and prejudice influenced the determination." (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1134 [94 Cal.Rptr.2d 448].)

We do not find that the award at issue here reaches the level of an abuse of discretion. The trial court handled this case for several years, and upon remand engaged in a rigorous and thorough procedure to review the attorney billings. We are not in a position to second guess the court's factual findings, nor are we persuaded that the attorney fees were awarded arbitrarily with no reason or justification. We therefore conclude that after the adjustments made according to the first step of *Hensley,* the trial court did not err by failing to further reduce the award to account for respondent's lack of success.

In conclusion, we borrow from Justice Powell's observations in his concurring opinion in *Riverside*: "On its face, the fee award seems unreasonable. But [we] find no basis for this Court to reject the findings made and approved by the [court] below." (*Riverside v. Rivera, supra,* 477 U.S. 561, 581 (conc. opn. of Powell, J.).) Although we may have exercised our

discretion differently, we "cannot conclude that the detailed findings made by the [trial court], . . . were clearly erroneous, or that the [trial court] abused its discretion in making this fee award." (*Id.* at p. 586.)

DISPOSITION

Accordingly, that part of the attorney fee award based upon billings submitted for work performed on the unsuccessful attorney fee issue in the prior appeal is reversed. The case is remanded to the trial court for the limited purpose of deleting from the total award those amounts that relate solely to billing for work done on the attorney fee issue in *Harman, supra,* 136 Cal.App.4th 1279. In all other respects the judgment is affirmed.

The parties are to bear their own costs on appeal. And in light of our conclusion that the attorney fee award must be reduced in part, and in an effort to bring this protracted litigation to a close, we exercise our discretion to find that neither appellant nor respondent is the prevailing party in this appeal for purposes of recovery of attorney fees for work associated with this appeal.

Swager, J.

We concur:

Marchiano, P. J.

Margulies, J.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF SAN MATEO

Stephen E. Cheresnik, et al.

Plaintiffs,

versus

City and County of San Francisco, et al.

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Case No. 411379

ORDER AWARDING ATTORNEYS FEES AFTER REMAND OF ATTORNEYS FEES AWARD

(Filed Sep. 7, 2006)

On appeal by Defendant, the First District Court of Appeal remanded this Court's attorneys fees award, pursuant to 42 U.S.C. section 1988, to Plaintiff Allen Harman ("Plaintiff" or "Harman" hereinafter) in the amount of $1,095,202.98 ($382,050.23 to Nageley, Meredith, & Miller, Inc.; $713,152.75 to The Pacific Legal Foundation) for reconsideration and explanation. A request by Plaintiff for additional fees associated with the work on the appeal and thereafter is also considered and ruled on herein.

The initial submissions by Plaintiff on his motion for an award of attorneys fees pursuant to 42 U.S.C. section 1988 convinced this Court that billing judgment was exercised by Plaintiff's attorneys in preparing the billing summaries. The court has considered the case law cited by the First District which holds that a lodestar figure wherein billing judgment has been exercised is presumptively reasonable, and that the party opposing the fee award bears the burden of

showing otherwise. Although, Defendant claims that billing judgment had not been exercised, it failed to make the required showing to that effect.

Defendant's unspecific conclusory objections concerning duplication of effort in its initial opposition do not meet its burden in opposing the fees requested. A review of the billing summaries for reference to the Defendant's challenges concerning deposition time shows minimal apparent overlap of time (as much as 6 hours regarding preparation for the depositions of Yee and Jeffries) between two of Plaintiff's lawyers, but it does not appear, and again Defendant has failed to show, that such apparent overlap is not consistent with the relative contributions of the two lawyers.

The initial submission by Plaintiff also reveals that Plaintiff's counsel excised most of the time spent on equitable claims (all federal court, some state court) and further reduced the resulting lodestar by approximately 25% to reflect lack of total success.

The rates presented in the lodestar calculations are supported by the evidence in the declarations submitted in support of the attorneys fees award.

This Court has considered the case law cited by the First District concerning determination of related and unrelated claims and concerning adjustments to the lodestar based on *Hensley*. This Court recognizes that *Hensley*, as a first step, requires eliminating from the lodestar only time spent on unsuccessful, unrelated claims that can be isolated, and adjustment

in the second step for any time remaining that was spent on related claims that were unsuccessful. This Court further recognizes from the same source that if all the challenged time can be isolated and excised in the first step, there is no requirement to go on to the second step. This Court further recognizes that an unsuccessful motion or stage of litigation is tested for relatedness under the same analysis as determining whether claims are related and if the motion or stage was related, the lack of success on the motion or stage is to be accounted for in the second step under *Hensley* of evaluation of the relationship between the amount of fees awarded and the results obtained.

In this Court's view, having considered the applicable authority, the requests for alternative relief (equitable) were not unrelated claims. The three original plaintiffs asserted various claims for relief on various theories but on the same general set of facts, similar and common legal theories, and all relief requested was to deter illegal discrimination in promotions at the Airport. Further the claims that were in federal court are not unrelated to the claims in state court – they are the same claims being pursued continuously from federal to state court.

Had Plaintiff not conceded that the equitable claims and the cases by the other two original plaintiffs were unrelated to the successful claim, this Court would have found the claims by the other plaintiffs related as arising out of a common core of facts and based on the same or similar legal theories as Harman's claims. In that event, the court would

have viewed the equitable claims as alternative relief only and not distinct claims (federal and state just continuation of claims) and thus have made no deduction for federal equitable claims as separate claims in the first step of *Hensley*. Thus, that time would have been accounted for in the second step of considering overall success.

But Plaintiff, in his original submissions, excised all time expressly related to the cases on behalf of the other two original plaintiffs and a portion of all other time up to the dismissals by those plaintiffs to account for intertwined time. Plaintiff also excised time related to the federal court equitable claims and some time related to the equitable claims in state court By excising that time, Plaintiff impliedly conceded that the equitable claims and the cases brought by the other two original plaintiffs were unrelated. Plaintiff therefore accommodated within the lodestar submitted the first step in adjusting the lodestar under *Hensley* (determining whether plaintiff failed to succeed on claims that were unrelated to the claims on which he succeeded and excising the associated time to the extent that it can be isolated).

Although Defendant did not make a point of this, a review of the billing summaries in the initial submission shows that time remains in the lodestar calculation for work on the equitable claims that Plaintiff has conceded are unrelated. Plaintiff in the main, excised all time expressly related to equitable claims in federal court, but some time obviously remains intertwined in the federal court time that

was not solely related to the other two plaintiffs. Some of that time could be isolated and excised (2.4 hours of McCutcheon time regarding preliminary injunction), but some of it is intertwined with time spent on the successful claim. Based on Plaintiff's concession, account would have to be made for such time in the second step.

The Defendant challenged the time spent on the unsuccessful preliminary injunction in state court. This Court views this as a challenge to a subset of "the equitable claims" and thus duplicative. In any event, it actually is a challenge to an unsuccessful stage in the litigation and is thus is taken into account in the second step of *Hensley*.

This Court recognizes that time on unsuccessful related claims is accounted for in the second step under *Hensley*, but that fees for an unsuccessful stage may be awarded if the stage is found to have been a necessary step to ultimate victory. It is recognized that reduction via the second step is not appropriate for unsuccessful legal theories alternative to one that succeeded. In the case of nominal or de minimus damage awards, attorneys fees can be severely reduced. It is also clear that a declaration that a constitutional violation has occurred without damages is not de minimus because such a victory benefits both the plaintiff and the public, and the public purpose of litigation should be considered in assessing overall success. Where recovery of private damages is the purpose of civil rights litigation, a court is obligated to give primary consideration to the actual damages

awarded as compared to the amount sought. In the second step under *Hensley,* the court focuses on the significance of overall relief obtained by plaintiff in relation to the hours reasonably expended on the litigation, and includes consideration of the amount of damages awarded as compared to the amount of damages and the number of defendants found liable as compared to the number of defendants sued. *Farrar* is cited for the propositions that the most important factor in a fee award in civil rights suits is the degree of success obtained, and that the awarding court is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought. It is recognized that while some courts since *Farrar* could be said to have exercised a market restraint in approving attorneys fees awards that constitute a high multiple of the actual damages awarded, the majority of the federal districts adhere to the rule that proportionality *per se* does not require reduction of fee requests. However, proportionality between the actual damages and the fees awarded is a factor to be addressed in the second step under *Hensley*. Lack of success on factually distinct claims must be accounted for in the second step under *Hensley.* Awards in civil rights litigation can be lowered where the result does not contribute to the development of legal principles and would have little deterrent effect. In civil rights litigation there is frequently an overlap of efforts relating to successful claims and to claims that ultimately fail, and no surgical standards exist by which to neatly and minutely isolate and sever elements of legal services

devoted to this division of claims. The pursuit of successful causes of action often entails and is inexorably intermingled with claims that do not prevail insofar as the claims involve a common core of facts or are based on related legal theories. In assessing the results obtained consideration is to be given as to any public purpose that may be served by the litigation. Vindication of a constitutional right is important even if only a small amount of money is involved, and it is improper to make a reduction based simply on the ratio of successful issue to issues raised. Reduction is proper where the overall success, however significant, is limited in comparison to the scope of the litigation as a whole. An aspect of assessing overall success is to determine the legal significance of the outcome of the litigation. The possibility of a windfall to a plaintiff in civil rights litigation is taken into consideration, and a balance between that possibility and the need to attract competent counsel to prosecute such cases was struck by Congress in enacting section 1988. The deterrent effect of a fee award substantially greater than the compensatory damages awarded serves the public purpose of assuring that agents of the state will not deliberately ignore constitutional rights.

The applicable authority shows that in the second step under *Hensley,* adjustment to the lodestar is considered for intermingled time on unrelated claims and/or lack of total overall success. Considering Plaintiff's concessions concerning "the equitable claims", as discussed above there remains in the initial lodestar

calculation the following intermingled time to be accounted for in step two:

Miller	11.3 hours re summary judgment 13.0 hours re appeal all federal court time
McCutcheon	119.3 hours re motion for summary judgment 1.3 hours re appeal all federal court time
Browne	11.3 hours re summary judgment 10.3 hours re appeal all federal court time
Caso	1.9 hours re summary judgment 10.3 hours re appeal all federal court time
Grant	all federal court time

However, the additional reduction in hours as reflected in the submissions by Plaintiff on remand by Nageley, Meredith & Miller, Inc. (reduces the time by 50.3 hours or $17,605) more than accounts for all of Miller's time regarding summary judgment and appeal (11.6 hours) and all federal court time (37.4 hours) assuming all that time was related to the other plaintiffs, which of course cannot have been the case. Thus, no further adjustment for Miller's intermingled time is necessary.

The submission on remand by The Pacific Legal Foundation reduces by $40,470 for time spent on the application for preliminary injunction in federal court

and the appeal of its denial to the Ninth Circuit its initial lodestar submission concerning work for Plaintiff alone on equal protection claims in federal court of $155,565, and then further reduces the remaining $115,095 by 50% to reflect the fact that Plaintiff obtained only half the relief sought ultimately on the equal protection claim (damages, but not injunctive relief). The $40,470 represents about a one-quarter reduction for work on behalf of the other two plaintiffs that could not be isolated and excised. This appears reasonable based on the reasonable presumption that the vast majority of the work on the preliminary injunction and appeal would have been necessary if Harman had been the only plaintiff. Defendant did not make any showing to the contrary. The subsequent further reduction by one-half for having achieved only one-half of the relief requested on the equal protection claim ultimately seems reasonable and more than fair. It eliminates the need for further reduction to federal court time for overall success based on not having achieved all relief requested on the equal protection claim. To further reduce attorneys fees based on not obtaining all relief requested relative to the equal protection claim would constitute doubly accounting for such "limited success".

As to the McCutcheon, Browne, and Caso time spent on behalf of the other two plaintiffs on summary judgment and appeal in state court intermingled with that spent relative to Harman, this Court will reduce that time by one-quarter., [sic] following

the Plaintiff's theory in the reduction attributable to the work for the other two plaintiffs in federal court discussed above. The computed reductions are as follows:

McCutcheon's total of 120.6 hours would be reduced by 30.15 hours at $250 or $7,537.50

Browne's total of 11.6 hours would be reduced by 2.9 hours at $375 or $1,087.50

Caso's total of 12.2 hours would be reduced by 3.05 hours at $400 or $1,220.00

These reductions amount to a further reduction to The Pacific Legal Foundation portion of the lodestar of $9,845.00.

As to an adjustment to the revised lodestar to reflect overall limited success, this Court makes no further reduction for not obtaining success on the equitable claims, as to do so would amount to doubly reducing fees for what Plaintiff has conceded were unrelated claims, and has already been taken into account in his submissions related to the attorneys fees award or by this Court's further deduction above.

This Court denies Defendant's request to award no fee at all. Plaintiff recovered damages for lost wages and emotional distress against his employer based on the conduct of its EEO manager to whom it had delegated policymaking authority. The recovery was not nominal or de minimus, and thus a reduction based on *Farrar* and the other case law construing it in which the recovery was of nominal damages or

de minimus, compared to what was requested, have no application here. Plaintiff's counsel put on evidence via expert testimony of economic damages between $8,300 and $39,000 and requested $30,000 in emotional distress damages. The jury awarded Plaintiff $15,300 in economic damages and $15,000 in emotional distress. The award was not one of nominal damages and was not de minimus compared to what Plaintiff requested at trial.

Further, this Court finds that this is not a case in which Plaintiff's primary purpose was to recover private damages. Plaintiff wanted to be promoted from the list he had been put on, which did occur while the action was pending. This Court finds that Plaintiff received the promotion when he did because of his suit. Also, Plaintiff clearly wanted Defendant to stop implementing its illegal practice, which again happened while the suit was pending. This Court also finds that Defendants changed their challenged practice at the time they did because of Plaintiff's lawsuit. Therefore, those cases narrowing attorneys fees awards where the plaintiff's primary aim was the recovery of monetary damages for himself have no application here.

Plaintiff succeeded at trial on the only claim, stated in two counts, he took to the jury – that he had been injured by Defendant's policy of discriminating based on race in promotions at the Airport. Any arguable lack of success reflected by the overturning on appeal as to the other count has been taken into account in the lodestar reduction in the initial

submission of approximately 25% as referred to above. Further, as the case law teaches, monetary recovery alone is the not measure of success, particularly in civil rights cases. Plaintiff obtained by way of special verdict a statement to the Defendant that it had an official policy of intentionally discriminating against white males in promotional opportunities at the San Francisco International Airport via its delegation of authority to the EEO Manager, that it intentionally denied Plaintiff a promotion because of his race, and that its discriminatory conduct caused damage to Plaintiff. Further, Plaintiff achieved a benefit to the public via the published opinion establishing that employers may not shield themselves against liability for illegal discriminatory conduct by its employee when it has, in fact, a policy or practice of delegating final decision making authority in the realm of the conduct at issue to that employee.

Based on the above discussion, this Court finds that all of the lack of success argued by Defendant has been incrementally accounted for and therefore declines to reduce the lodestar figure further. To do so would be a double reduction for lack of overall success. While the fees award is far greater than the amount of monetary damages awarded, it is not out of proportion to the overall success and significance of the litigation, and is commensurate to Plaintiff's long, hard-fought struggle for vindication of his constitutional right. Vindication of that constitutional right benefits the public. To reduce the award further would deter lawyers from taking such cases and thus

not deter agents of the state from violating constitutional rights of its employees.

Considering the amount of damages awarded with those sought, the Court declines to further reduce the lodestar figure. Plaintiff's damage expert opined as to three different measures of damage, computing amounts of $8,300, $33,500, and $39,000. No specific amount of emotional distress damages was requested at trial. The jury awarded $15,300 in economic damages and $15,000 in emotional distress damages. Thus, Plaintiff obtained 39% of its highest economic damage scenario. And, when considering the emotional distress damages, the jury awarded 78% of the highest amount of actual damages requested.

This Court finds that Defendant did not make an oral $30,000 oral offer of settlement at the settlement conference. Thus, further consideration of reduction of the award based on refusal to accept a settlement in light of only a minimal additional amount awarded by the jury is not considered further.

In summary then, The Pacific Legal Foundation initial lodestar as reflected in the billing summaries submitted of $1,063,279.50 is reduced in the initial submission for limited overall success to $713,152.75 and that figure is, by stipulation in the brief on remand, reduced by $98,017.50 and by $9,845.00 for intermingled time on summary judgment and appeal in state court attributable to the other two initial plaintiffs, resulting in $605,290.25. The Nageley,

Meredith, & Miller, Inc. lodestar figure of $382,050.23 is reduced according to its stipulation in its brief on remand by $17,605, to $364,445.23. Thus, the adjusted award prior to considering fees on appeal and for work on remand is $969,735.48.

Defendant concedes that this Court has discretion to award fees associated with the appeal and for the remand proceeding, but requests it not do so because Plaintiff already is recovering fees in excess of its jury award and because the appeal would not have been necessary had Plaintiff settled. But, Defendant provides no legal authority showing that the court's discretion could be exercised on either asserted basis. The fees requested relative to Nageley, Meredith, & Miller, Inc. in the amount of $16,886 based on the declaration of Andrea Miller seem reasonable. A review of the additional fees requested by The Pacific Legal Foundation shows that it has included fees for a petition for rehearing of the Defendant's appeal. Fees for such time should be excised, as it is obvious that petitioning for rehearing was an unnecessary and unsuccessful step in the litigation. The additional fees and computation of the portion to be excised follows:

Attorney Caso submitted evidence of 9.9 hours spent on appeal and thereafter, but a review of the billing summary in his declaration shows that .8 hour was spent on the rehearing issue, so the award as to his work should be 9.1 hours at $400, or $3,640.

Attorney Browne submitted evidence of 67.9 hours spent on appeal and thereafter, but a review of the billing summary in her declaration shows that 3.6 hours were spent on the rehearing issue, so the award as to her work should be 64.3 at $375, or $24,112.50.

Attorney L Fetra submitted evidence of 25.0 hours spent on appeal and thereafter, but a review of the billing summary in her declaration shows that .2 hour was spent on the rehearing issue, so the award as to her work should be 24.8 hours at $250, or $6,200.00.

Attorney Beard submitted evidence of 448.6 hours spent on appeal and thereafter, but a review of the billing summary in his declaration shows that 14.5 hours were spent on the rehearing issue, so the award as to his work should be 434.1 hours at $215, or $93,331.50.

Thus, the total additional fee to be awarded for work by The Pacific Legal Foundation on the appeal and thereafter, including on remand is $127,284.00.

The total additional fees awarded to Plaintiff associated with the appeal and proceedings thereafter is $144,170.00, for a new total award of $1,113,905.40.

This Court did not consider the Plaintiff's request for an award of interest because that was not an issue remanded and because Defendant did not brief the issue.

Dated: 9/6/06

/s/ Thomas McGinn Smith
THOMAS MCGINN SMITH,
JUDGE OF THE
SUPERIOR COURT

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ALLEN HARMAN, Plaintiff and Respondent, v. CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Appellants.	A108246, A109226 (San Mateo County Super. Ct. No. 411379) (Filed Feb. 22, 2006)

In an earlier appeal in this employment discrimination case, we reversed a summary judgment in favor of the defendants, City and County of San Francisco, individual members of the San Francisco Airport Commission, and the director of the San Francisco Airport (hereafter City) with respect to one cause of action of one plaintiff, Allen Harman (hereafter Harman), who claimed to have suffered an approximate one-year delay in promotion as the result of racial discrimination in violation of the federal Civil Rights Act of 1871 (42 U.S.C. § 1983). Following a seven-day trial, the jury awarded Harman compensatory damages of $30,300 based on a special verdict finding discrimination against White males in promotional opportunities, and the trial court subsequently awarded Harman's counsel $1.1 million in attorney

fees. We affirm the judgment for damages but remand the award of attorney fees for further consideration.

FACTUAL AND PROCEDURAL BACKGROUND

In September 1999, three White males, including Harman, who were employed as airfield safety officers at the San Francisco International Airport, filed a complaint in federal court alleging employment discrimination. After lengthy federal court proceedings involving, inter alia, an appeal to the Ninth Circuit Court of Appeals, the parties stipulated to filing a new complaint in state court. The complaint initially sought only equitable relief but was later amended to include a cause of action for damages. The first three causes of action of the first amended complaint alleged discrimination on the basis of race and sex in violation of Proposition 209 (Cal. Const., art. I, § 31) and the equal protection clause of the Fourteenth Amendment to the United States Constitution and sought prospective equitable relief through an injunction, declaratory judgment, and writ of mandate commanding City "to implement race- and sex-neutral recruitment, hiring, and promotional policies." The fourth cause of action sought damages under Proposition 209 and the federal Civil Rights Act as codified in title 42 United States Code section 1983 (hereafter section 1983).

The trial court sustained the City's demurrer to the fourth cause of action, as it stated a claim of damages under Proposition 209, on the ground that it

did not allege compliance with the Government Claims Act. (Gov. Code, § 905 et seq.) After completion of discovery, the court granted the City's motion for summary judgment on the remaining causes of action and the plaintiffs appealed.

We affirmed the summary judgment with respect to the claim of prospective equitable relief in the first three causes of action, finding that the City adopted an equal employment opportunity plan in July 2000 that stated policies consistent with evolving legal standards of employment discrimination under equal protection jurisprudence and Proposition 209.[1] We found "no basis in the record to question the Airport's commitment to conform to changing legal standards in the area of employment policy." We also affirmed the summary judgment with respect to the claims of damages of two of the three defendants. In the case of Harman, we affirmed the demurrer to the claim for damages under Proposition 209, but we found a triable issue of fact relating to his claim of damages under section 1983 arising from a delay in receiving a promotion to the job classification of 9220 Airport Operations Supervisor.

The complaint originally attacked three personnel decisions: the termination of a pool of eligible

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[1] Our decision noted that the Airport's revised policy in July 2000 anticipated by four months the decision of the California Supreme Court in *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537 [101 Cal.Rptr.2d 653, 12 P.3d 1068], rendered in November 2000.

candidates for a provisional appointment, the appointment of an acting supervisor for a 90-day period in April 1999, and the permanent appointment of airport operating supervisors through the normal civil service procedure. Since Harman received a permanent promotion as airport operations supervisor in May 2000, his claim for damages was necessarily restricted to the other two personnel decisions.

The summary judgment dismissing the claim for damages in the earlier appeal was based on the City's contention that plaintiffs failed to show evidence of a discriminatory purpose in the challenged personnel actions. In reversing the dismissal of Harman's section 1983 claim, we found a triable issue of fact as to a racially discriminatory purpose in the termination of the provisional pool and the acting appointment. The parties did not raise, and we did not consider another element of the plaintiffs' case required by *Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658 [56 L.Ed.2d 611, 98 S.Ct. 2018] – evidence that the personnel decision arose from the execution of official policy or custom of the City.

In the trial following remand, the City moved for nonsuit on the ground that Harman's case in chief failed to produce evidence satisfying *Monell* requirements. After the motion was denied, the City requested an instruction that identified the Civil Service Commission of San Francisco as the City's policy maker in personnel administration. The trial court declined to identify the commission or any other

official or municipal body as the source of official policy.

Responding to a special verdict form, the jury found that the City had "an official policy or custom to intentionally discriminate against [W]hite males in promotional opportunities at the San Francisco International Airport." The jury then awarded Harman $15,300 as damages for economic harm and another $15,000 as damages for emotional distress. The City moved for judgment notwithstanding the verdict and for new trial relying chiefly on a claim of *Monell* error. The trial court denied the motions and entered judgment for Harman.

Harman then filed two motions for attorney fees under 42 United States Code section 1988 in the total amount of $1,095,202. He sought $713,152.75 on behalf of the Pacific Legal Foundation, which filed the original action, and $382,050.23 for trial counsel, Andrea Miller. The trial court awarded the entire sum finding that it was "reasonable, after due consideration of the success obtained relative to the relief sought and other circumstances of this case." The City filed a timely notice of appeal.

DISCUSSION

In its opening brief, City states that it does not challenge the sufficiency of the evidence on discriminatory purpose in deference to our ruling reversing the summary judgment of Harman's section 1983 claim and confines its arguments to the claim of

Monell error. But the factual connection between issues of discriminatory purpose and *Monell* error is so close that it is impossible to meaningfully consider one without the other. We will therefore review the evidence of discriminatory purpose before addressing *Monell* issues.

A. Evidence of Discriminatory Purpose

1. Applicable Law

As explained in more detail in our earlier decision, "[s]ection 1983 provides a remedy for state action that purposefully discriminates on the basis of race in violation of the equal protection clause of the Fourteenth Amendment. [Citation.] The protection afforded by section 1983 includes relief from discriminatory employment practices of public employers." (*Poolaw v. City of Anadarko* (10th Cir. 1981) 660 F.2d 459, 462.) To recover damages for an equal protection violation under section 1983, a plaintiff must show that the municipality's action was motivated by a "discriminatory intent or purpose." (*Arlington Heights v. Metropolitan Housing Corp.* (1977) 429 U.S. 252, 265 [50 L.Ed.2d 450, 97 S.Ct. 555].) "[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." (*Washington v. Davis* (1976) 426 U.S. 229, 240 [48 L.Ed.2d 597, 96 S.Ct. 2040].)

It is not necessary to prove that the municipality's action "rested solely on racially discriminatory purposes." (*Arlington Heights v. Metropolitan Housing*

Corp., supra, 429 U.S. 252, 265.) In *Arlington Heights,* the Supreme Court explains, "[I]t is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." (*Id.* at pp. 265-266, fn. omitted.)

Beginning with *University of California Regents v. Bakke* (1978) 438 U.S. 265 [57 L.Ed.2d 750, 98 S.Ct. 2733], the Supreme Court has interpreted the equal protection clause of the Fourteenth Amendment as extending protection against racial discrimination that may be asserted by a person of any race, without regard to membership in a group suffering from a history of racial discrimination. As stated in *Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 494 [102 L.Ed.2d 854, 109 S.Ct. 706], "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."

A plaintiff is not entitled to relief, however, unless he can show that he was injured by the challenged action. In *Texas v. Lesage* (1999) 528 U.S. 18 [145 L.Ed.2d 347, 120 S.Ct. 467], the plaintiff claimed that he was refused admission to a Ph.D. program because of his race. The university secured a summary judgment on the ground that the plaintiff was

not a close contender for the graduate program. Affirming the judgment, the Supreme Court held: "even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration. . . . [¶] Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983." (*Id.* at pp. 20-21.)

2. Factual Background

Harman earned a college degree in aviation business administration, with an emphasis in airport management, and began working in 1989 for an aviation company. Two years later, he took an entry-level job with San Francisco International Airport (hereafter the Airport). In December 1993, he accepted the position of airfield safety officer. During the next five years he consistently received outstanding performance reviews for his work in this position, and in 1998 he began to actively seek a promotion.

The Airport fills all permanent positions through the civil service merit system mandated by section 10.101 of the Charter of the City and County of San Francisco (hereafter Charter section 10.101), but a

manager will sometimes ask the Airport's human resources department to fill a vacancy for which there is no civil service list in existence. The department may then make arrangements for a provisional appointment which will be effective for a maximum of three years or until a permanent appointment can be made in accordance with normal civil service procedures. In making a provisional appointment, the department creates a pool (or list) of eligible employees through its own screening process, which is typically faster and less thorough than the procedure for permanent appointments through the civil service system. Provisional eligibility pools are created for current vacancies but are occasionally kept open to fill additional vacancies in the job classification that later occur.

While provisional appointments are made outside the normal civil service procedures, they require the approval of the Equal Employment Opportunity (EEO) Manager of City's central human resources department. The EEO Manager at all times relevant to this appeal was Dorothy Yee. She or her staff in the central human resources department reviewed all the Airport's choices for provisional appointments and possessed the power to approve or disapprove its selection.[2]

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[2] Although it is undisputed that Yee possessed this power, the parties have not provided us with a citation or other explanation of its legal basis. At trial Rafael Centeno, the Airport

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Alternatively, the Airport can select an employee to serve 90 days on an acting assignment. The procedure for selecting employees for such acting assignments follows the same general steps as that for provisional appointments, with selection from a list of eligible employees, but it proceeds more expeditiously and does not require approval of the City's EEO Manager.

In 1999, the Airport's work force was expanding in anticipation of an increase in staffing needs with the construction of a new international terminal building. For the 1998-1999 fiscal year the operations division for which Harman worked was planning 193 new hires. The labor market for those positions that required experience in aviation, such as airport operations supervisor, was dominated by White males and lacked ethnic and racial diversity. Airport recruited applicants from other airports, airlines, and flight schools, but it received few applications from outside the airport for provisional appointments.

In an announcement issued in October 1997, and later revised in January 1998, Airport management requested applications for a provisional appointment to the position of 9220 Airport Operations Supervisor to fill a current vacancy. It received 21 applications, all from the San Francisco Bay Area, and interviewed 14 of the applicants. From this number, management

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human resources manager, offered the opinion that the authority was "probably in the civil service rules."

selected a provisional pool of seven eligible employees, including Harman. All persons in the pool were racially White. Management filled the current vacancy by appointing a White female, who was then serving as an acting supervisor, but kept the pool open for later appointments. "Three or four months" later, management made a second appointment from the pool – a White male who had ranked highest in the interviews.

In late August 1998, the operations department decided to request approval of the promotion of a third person from the provisional pool, Michael Robert, but the formal written request to Dorothy Yee, the EEO Manager of the City's human resources department, was apparently not submitted until October 19, 1998. Yee testified that she initially objected to the appointment because it drew from a job category, airfield safety officer, with greater ethnic and racial diversity than was found in the supervisory level. Andrea Gourdine, the City's Human Resources Director, conveyed the concerns of the EEO department to John Martin, the Airport director in a letter dated November 18, 1998. She noted among other things that "five appointments have been made to class 9220 since 1995; all five are White."

In a letter dated October 28, 1998, Valerie Jeffries, the personnel analyst in charge of processing the provisional appointment, presented Yee with a detailed justification for the promotion of Robert but she did not immediately secure the desired approval. Martin made further effort to defend Robert's

appointment in a letter to Gourdine dated December 17, 1998. Yee then approved the appointment by signing a personnel action form on January 4, 1999.

The initial interviews for the 9220 position were conducted by three middle management supervisors, Kimberly Dickie, Glenn Brotman, and Drake Poston, who were responsible for making recommendations to Lamont Foster, the Airport Operations Superintendent, who made the actual selections for promotion. They interviewed the provisional pool again before recommending Robert to make sure of the current status of the candidates. According to Brotman and Dickie, they were disposed to recommend Harman next for appointment from the pool. Dickie recalls telling Harman that he had done well and should "feel very good about another opportunity."

The delayed and contested approval of Robert effectively ended the consideration of Harman for promotion from the provisional pool. With the passage of time, the pool became increasingly unsuitable for use because it was less likely to contain all potentially available candidates. Provisional pools ordinarily were not kept open longer than six months; the pool for the 9220 position was a year old by the time Robert was appointed. Jeffries testified that she was unwilling to risk incurring again the delays and effort required to secure EEO approval of Robert's appointment.

At trial, plaintiff's counsel sought to link Harman's delayed promotion to a document, known as

the Airport's diversity staffing plan, which the Airport Director of Human Resources, Rafael Centeno, prepared for use in federal grant applications.[3] In general, the plan stated the goal of employing "a workforce at San Francisco International Airport which is reflective of the available labor market for each occupational category in San Francisco and San Francisco/Bay Area." The document analyzed the extent that particular ethnic and racial groups were underrepresented in particular job categories relative to the regional labor market and expressed the objective of reducing these levels of underrepresentation.

The EEO Manager, Dorothy Yee, testified that the Airport's diversity staffing plan was sent to her for review and comment, but she did not submit it to the civil service commission for approval, and she did not consult it in reviewing the Robert appointment. She claimed to be guided instead by civil service commission rules and by policies and procedures promulgated by the City's Human Resources Director. Only fragmentary documentation of these rules and policies were introduced at trial and submitted to the jury.[4] Nevertheless, we regard the diversity staffing

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[3] Plaintiff claims that the Diversity Staffing Plan was approved by the Airport commission, but the record discloses only that it was approved by the Airport Director, John Martin, and disseminated to "senior and management staff."

[4] Rule 3 of the Civil Service Commission, introduced as a plaintiffs' exhibit, stated the policy "to achieve a qualified workforce that reflects the labor force availability of minorities

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plan as admissible evidence of policies that pervaded City personnel administration. Centeno testified that he attempted to draft the Plan to be consistent with a corresponding City policy statement; it was reviewed not only by Dorothy Yee but also by Theresa Lee, the Deputy Airport Director for Administration, and it was approved by John Martin, the Airport Director.

We find portions of Yee's trial testimony that reflected a concern for underrepresentation of minorities in particular job categories that mirrored the policy of the diversity staffing plan. A handwritten note dated December 17, 1998, of Yee's conversation with Centeno went further: it revealed an intent to pressure Airport management to make minority promotions to positions in which they were underrepresented. Yee wrote: "pushing Lamont Foster to hire next appts will be minority."

In late December 1998, the Airport personnel management communicated to the central human resources department its desire to schedule a civil service examination for the 9220 position, but this examination process took 6 to 12 months to carry out and management anticipated a more immediate need to make appointments. On January 8, 1999, the Airport management issued an announcement for a new provisional appointment, thus effectively canceling the existing provisional pool to which Harman

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and women in San Francisco." (San Francisco Civil Service Commission Rules, rule 3, § 3.1.3 [Affirmative Action Policy].)

belonged. Shortly thereafter the operations management decided it needed a still shorter time schedule for the appointment. On March 5, 1999, Lamont Foster disseminated an announcement that there would be an acting appointment for the position. All applicants for the recent provisional announcement were to be considered without a need for submitting new applications.

Seventeen employees applied for the acting position, including Harman. Their applications and resumes were screened by a human resources representative, Clarice Clarke and two upper-level employees in the operations department, Lamont Foster, Airport Operations Superintendent, and Don Whittaker, Assistant Deputy Director of Operations. They independently rated the employees on four criteria on a scale of one to five and averaged their scores. The top six applicants were selected for interviews. None of the members of the former provisional pool were selected for the interview stage. Harman received a letter from Clarice Clarke dated March 25, 1999, informing him that he was not among the candidates advancing to an interview stage.

Three of the six employees who proceeded to the interview stage were minorities – a Pacific Islander male, an African-American woman, and a Hispanic male – and they were ranked as the top three candidates following the interviews. Unlike the Robert provisional appointment, the record of the selection process does not affirmatively reveal that race or ethnicity was taken into account in the selection

process. Plaintiffs, however, sought to draw such an inference by introducing statistical studies prepared by the Airport human resources staff that monitored the composition of the work force by gender, ethnicity and race during this period.

The operations management team ranked Dennis Neves, the Pacific Islander, highest among the applicants, and his promotion was announced on April 12, 1999. Neves had outstanding qualifications for a supervisory position. He had been employed as an airfield safety officer for approximately eight years and had previously worked for 19 years in the airline industry, mostly in supervisory positions. For over 10 years, he had worked as a station manager for Air Cal Airlines in various cities and continued with this work for about three years after the airline was acquired by American Airlines. Though Neves had not applied for the provisional appointment, he had previously qualified for the interviews in applications for higher supervisory positions.

The record of the preliminary screening process indicates that Neves received markedly higher scores than Harman, who lacked comparable experience in supervisory positions. The two scoring sheets disclosed in the record show that Harman ranked consistently as 10, while Neves received scores 13 and 20.

In September 1999, the City issued an announcement of a civil service examination for the position of 9220 Airport Operations Supervisor.

Harman qualified for the eligibility list and was promoted in May 2000.

3. Sufficiency of the Evidence

We conclude that the record supports a finding that racial discrimination was a "motivating consideration" in the termination of the provisional pool. As we have seen, the cancellation of the pool was not a deliberate decision but rather an action that was effectively compelled by the lengthy and contested process of securing the approval of the EEO Manager, Dorothy Yee, for the provisional appointment of Robert. The City argues that the provisional pool was then too old. It notes that such pools ordinarily did not stay open for longer than six months and the pool in question was extended approximately a year to allow the Robert promotion. But the Airport faced an unusual demand for increased staffing with the building of the new international terminal, and three Airport employees involved in processing the Robert promotion – Jeffries, Dickie and Brotman – testified that they contemplated the possibility of making a further appointment from the provisional pool before encountering resistance and delays in seeking approval of this promotion.

The record is somewhat unclear as to the standards applied by Yee in delaying the Robert promotion. Plaintiffs' counsel sought to link the alleged discrimination to the Airport's diversity staffing plan, and presented some evidence of other policies

possibly guiding the City's EEO Manager in approving provisional appointments. Yee's memorandum of December 17, 1998, appeared to reveal an intent to "push" the Airport Operations Superintendent, Lamont Foster, to make minority appointments without any balancing of policy interests. Particularly in light of this memorandum, we consider that the jury had a reasonable basis to conclude that a racially discriminatory purpose, i.e., a preference for the hiring of minorities in a job category in which they were underrepresented, was a motivating factor in Robert's contested promotion, which led inevitably to abandonment of the provisional pool, which included Harman, as a source of provisional appointments.

The evidence of a discriminatory purpose was less compelling in the case of the acting appointment. No inference of discrimination should be drawn from the Airport's monitoring of its employee force with respect to race and gender. As stated in *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 46 [112 Cal.Rptr.2d 5], "[a]ccurate and up-to-date information is the sine qua non of intelligent, appropriate . . . administrative action." The case for discrimination rested on Yee's possible influence, as suggested by her memorandum of December 17, 1998, and on the unusual success of minorities both in the preliminary screening process and in the interviews.

Whether or not this evidence would justify a finding of discrimination, the record clearly establishes that Harman cannot claim to be injured by an impermissible racial criterion under the principle of

Texas v. Lesage, supra, 528 U.S. 18. The acting appointment went to an employee, Dennis Neves, who had superior qualifications for the position. Thus, whether or not the selection process involved impermissible considerations, Harman cannot base his claim for damages under section 1983 on the acting appointment because the Airport would not have promoted him ahead of Neves in any event.

B. Requirements of *Monell*

1. Legal Background

The City's assignments of error in this appeal revolve around the same point: the contention that Harman failed to prove a policy or custom of the kind required by *Monell v. New York City Dept. of Social Services, supra,* 436 U.S. 658 (*Monell*). Departing from an earlier precedent, *Monell* held that municipalities could be sued directly for damages resulting from deprivation of a constitutional right, but the holding was subject to an important limitation. To find a municipality liable under section 1983, a plaintiff must identify a municipal policy or custom that caused the constitutional injury. (*Id.* at p. 694; *Board of Comm'rs of Bryan Cty. v. Brown* (1997) 520 U.S. 397, 403 [137 L.Ed.2d 626, 117 S.Ct. 1387]; *Abbott v. Village of Winthrop Harbor* (7th Cir. 2000) 205 F.3d 976, 981.) This limitation on the scope of section 1983 "does not create a 'defense'. It identifies an element of plaintiff's [damages], so the burden is on the plaintiff to demonstrate the essential policy or

custom." (*Smith v. Chicago School Reform Bd. Of Trustees* (7th Cir. 1999) 165 F.3d 1142, 1149; see *Board of Comm'rs of Bryan Cty. v. Brown, supra,* at p. 403.)

The *Monell* plaintiffs were a class of female employees of New York City who complained that their departments "had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons." (*Monell, supra,* 436 U.S. 658, 661.) The lower courts found a constitutional violation but ruled that the City was immune from liability under section 1983. Reversing the lower court ruling, the Supreme Court held that local governments "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." (*Monell, supra,* at p. 690.) In addition, the local governments "may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." (*Id.* at pp. 690-691.)

The *Monell* court limited this holding by stating: "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor – or,

in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." (*Monell, supra,* 436 U.S. 658, 691.) It concluded that "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." (*Monell, supra,* at p. 694.) The court found that the plaintiffs' case, which was based on a written rule,[5] unquestionably involved "official policy as the moving force of the [claimed] constitutional violation. . . ." (*Ibid.*)

While the municipal policy could easily be identified in *Monell,* the demarcation of the limits of municipal liability has proven to be elusive under other circumstances, prompting the Supreme Court to revisit the issue. (*Board of Comm'rs of Bryan Cty. v. Brown, supra,* 520 U.S. 397; *Jett v. Dallas Independent School Dist.* (1989) 491 U.S. 701 [105 L.Ed.2d 598, 109 S.Ct. 2702]; *Canton v. Harris* (1989) 489 U.S. 378 [103 L.Ed.2d 412, 109 S.Ct. 1197]; *St. Louis v. Praprotnik* (1988) 485 U.S. 112 [99 L.Ed.2d 107, 108 S.Ct. 915], (plur. opn. of O'Connor, J.); *Pembaur v. Cincinnati, supra,* 475 U.S. 469 (plur. opn. of Brennan, J.); *Oklahoma City v. Tuttle* (1985) 471 U.S. 808,

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[5] See *Pembaur v. Cincinnati* (1986) 475 U.S. 469, 481 [89 L.Ed.2d 452, 106 S.Ct. 1292] (plur. opn. of Brennan, J.).

824 [85 L.Ed.2d 791, 105 S.Ct. 2427].) We find *Praprotnik* and *Pembaur* to be particularly instructive.[6]

Praprotnik concerned a municipal employee who was transferred from one department to another and then laid off. He brought suit under section 1983 alleging that these actions were in retaliation for a successful appeal of an earlier suspension and therefore violated his First Amendment rights. The court found that the officials responsible for the plaintiff's transfer and discharge did not possess the policymaking authority necessary for municipal liability. The applicable law placed the authority to adopt rules and ordinances relating to personnel administration in the mayor, aldermen and civil service commission. The court held that, even if plaintiff's superiors retaliated against his exercise of First Amendment rights, "it says nothing about the actions of those whom the law established as the makers of municipal policy in matters of personnel administration. The Mayor and Aldermen enacted no ordinance designed to retaliate against respondent or against similarly situated employees. On the contrary, the city established an independent civil service commission and

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[6] Although *Praprotnik* was a plurality decision and *Pembaur* was a plurality decision in part, they were treated as guiding precedents in *Jett v. Dallas Independent School Dist., supra,* 491 U.S. 701, 737 ["the District Court did not have the benefit of our decisions in either *Pembaur* or *Praprotnik* to guide it"]. Moreover, *Board of Comm'rs of Bryan Cty. v. Brown, supra,* 520 U.S. 397, 406, relies extensively on *Pembaur* with respect to issues relevant to this appeal.

empowered it to review and correct improper personnel actions." (*St. Louis v. Praprotnik, supra,* 485 U.S. 112, 128 (plur. opn. of O'Connor, J.); see also *Feliciano v. City of Cleveland* (6th Cir. 1993) 988 F.2d 649, 654-656 [although chief of police sometimes issued policy statements on drug testing, the final policymaking authority in this area rested in the director of public safety]; *Crowley v. Prince George's County, MD.* (4th Cir. 1989) 890 F.2d 683, 685-686.)

In *Pembaur v. Cincinnati, supra,* 475 U.S. 469, 483 (plur. opn. of Brennan, J.), the court observed that "municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters," but not others. (See also *Davis v. Mason County* (9th Cir. 1991) 927 F.2d 1473, 1480.) Under the facts of *Pembaur,* the court found that a county prosecutor possessed final policymaking authority to direct deputy sheriffs to forcibly enter the plaintiff's clinic to serve two writ capiases. When plaintiff barred deputy sheriffs from entering his clinic, the deputies requested instruction from their supervisors who referred the issue to the county prosecutor. "The Prosecutor made a considered decision based on his understanding of the law and commanded the officers forcibly to enter petitioner's clinic." (*Pembaur v. Cincinnati, supra,* at p. 484 (plur. opn. of Brennan, J.).) The court held: "municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among

various alternatives by the official or officials responsible for establishing final policy. . . ." (*Pembaur, supra,* at p. 483 (plur. opn. of Brennan, J.).)

A corollary of the *Pembaur* decision is that an official or governing body with authority to make municipal policy may delegate this authority to a particular official with respect to certain matters. (See *Pembaur v. Cincinnati, supra,* 475 U.S. 469, 483 (plur. opn. of Brennan, J.); *St. Louis v. Praprotnik, supra,* 485 U.S. 112, 124 (plur. opn. of O'Connor, J.).) The courts emphasize that the delegation of authority must relate to *policy,* which "generally implies a course of action consciously chosen from among various alternatives. . . ." (*Oklahoma City v. Tuttle, supra,* 471 U.S. 808, 823; *Doe v. Claiborne County, Tenn.* (6th Cir. 1996) 103 F.3d 495, 507.) Moreover, the policymaking authority must be *final.* (*Abbott v. Village of Winthrop Harbor, supra,* 205 F.3d 976, 981; *Greensboro Prof. Fire Fighters Ass'n v. Greensboro* (4th Cir. 1995) 64 F.3d 962, 965; *Wulf v. City of Wichita* (10th Cir. 1989) 883 F.2d 842, 867-868.) As stated in *Gernetzke v. Kenosha School Dist. No. 1* (7th Cir. 2001) 274 F.3d 464, 468-469, "[t]he question is whether the promulgator, or the actor, as the case may be – in other words, the decisionmaker – was at the apex of authority for the action in question. . . . [¶] . . . [T]he cases limit municipal liability under section 1983 to situations in which the official who commits the alleged violation of the plaintiff's rights has authority that is final in the special sense that there is no higher authority."

These precedents make clear that discretionary authority to hire or promote employees does not alone give rise to municipal liability, even though the decisionmaker may have a final power to make such decisions. (*Gillette v. Delmore* (9th Cir. 1992) 979 F.2d 1342, 1350 ["the discretionary authority to hire and fire employees . . . is not sufficient to establish a basis for municipal liability"].) In a footnote in *Pembaur v. Cincinnati, supra,* 475 U.S. 469, 483 (plur. opn. of Brennan, J.), the court observed, "[T]he County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy." (Fn. 12.) In *Auriemma v. Rice* (7th Cir. 1992) 957 F.2d 397, the court held that the decision of the police chief to demote a group of White officers did not give rise to municipal liability. While recognizing the chief's executive power to make such personnel decisions, the court found that he did not possess the requisite policymaking authority. "Authority to make a final decision," the court held, "need not imply authority to establish rules." (*Id.* at p. 401.) Similarly, in *Greensboro Prof. Fire Fighters Ass'n v. Greensboro, supra,* 64 F.3d 962, where the fire chief was sued for retaliating against union members for the exercise of First Amendment rights, the court held that the plaintiffs failed to show that he acted pursuant to an official policy. "When a final decision by an employee implements municipal policy, then municipal liability may follow. But if a final decision does not implement municipal policy, or is contrary to it, then it is not imputable to the municipality." (*Id.* at p. 965.)

2. Analysis

The parties advance widely divergent, and equally untenable, arguments for the application of *Monell.* The City seeks to locate final policymaking authority in the civil service commission. This interpretation unquestionably begins with a sound premise: as noted in *Praprotnik* and other decisions, a municipal civil service commission is a common source of policymaking authority in the field of personnel administration. (*St. Louis v. Praprotnik, supra,* 485 U.S. 112, 126 (plur. opn. of O'Connor, J.); *Hyland v. Wonder* (9th Cir. 1997) 117 F.3d 405, 415; *Davis v. Mason County, supra,* 927 F.2d 1473, 1480.) The Charter of the City and County of San Francisco, the most basic source of municipal law (*City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95, 102 [248 Cal.Rptr. 290]), clearly and broadly defines the civil service commission's policymaking power in this area. Charter section 10.101 provides: "The Civil Service Commission shall adopt rules, policies and procedures to carry out the civil service merit system provisions of this charter and . . . such rules shall govern applications; examinations; eligibility; duration of eligible lists; . . . appointments; promotions; . . . the designation and filling of positions, as exempt, temporary, provisional, part-time, seasonal or permanent; . . ."

The City relies on the absence of proof linking Harman's complaint of racial discrimination with policies promulgated by the civil service commission. In particular, the City points out that the diversity

staffing plan, which was a focal point of Harman's case at trial, cannot be imputed to the commission. The plan was transmitted to the EEO Manager for her review, but it was never approved by the commission or filed with the commission as required by San Francisco Administrative Code section 16.9-24.[7]

The flaw in the City's argument is that it assumes that, since the civil service commission is a

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[7] San Francisco Administrative Code section 16.9-24 provides: "All such plans shall be prepared in consultation with the Civil Service Commission in order to provide technical assistance and recommendations on effective steps to achieve equal employment opportunity. Prior to adoption, the Civil Service Commission shall also approve each equal employment opportunity plan in cooperation with the City Attorney to ensure that compliance is made with all relevant federal, State and local equal opportunity laws or regulations. . . . All such plans shall, upon adoption, be filed with the Civil Service Commission for public or other inspection." The provision is incorporated by reference in San Francisco Civil Service Commission Rules, rule 3, section 3.1.4.

We see little merit in Harman's argument that San Francisco Charter section 4.102(1) gave the Airport plenary power to adopt a diversity staffing plan. This charter provision gives "each appointive board, commission or other unit of government" the power to "[f]ormulate, evaluate and approve goals, objectives, plans and programs and set policies *consistent* with the overall objectives of the City and County, as established by the Mayor and the Board of Supervisors through the adoption of City legislation. . . ." (Italics added.) The word "consistent" recognizes the supervisory powers of the board of supervisors, which it exercised in adopting section 16.9-24 of the Administrative Code. Harman's interpretation of this charter provision would lead to an anarchic pattern of autonomous agencies, boards and departments.

fundamental source of municipal policymaking authority in personnel administration, it is the *exclusive* source of such authority under *Monell.* The argument ignores the possibility that final policymaking authority (a) may exist outside the civil service system or (b) may be effectively delegated to a particular official within the civil service system.

An example of the former is found in *Hyland v. Wonder, supra,* 117 F.3d 405. The plaintiff worked for a while under financial grants and then as a volunteer assisting the chief juvenile probation officer in San Francisco. He was discharged by this official after writing a memorandum critical of the department and filed an action under section 1983 alleging violation of his First Amendment rights. As in the present case, the defendants claimed that final policymaking authority rested in the civil service commission or board of supervisors. The court ruled, however, that he was not an employee and therefore not within the policymaking authority of these bodies. Instead, by a process of delegation, the chief juvenile probation officer possessed final policymaking authority with respect to decisions affecting volunteers, including his discharge.

Similarly, the facts of the present case show an effective delegation of final policymaking authority regarding provisional Airport appointments to a particular official, Dorothy Yee, the EEO Manager of

the central human resources department.[8] As we have seen, Yee performed a policymaking role in reviewing departmental diversity staffing plans. The Airport's plan did not go beyond her office and was never submitted to the civil service commission. In the case of provisional appointments, Yee reviewed all recommended appointments with respect to the area of policy monitored by her department, i.e., compliance with fair employment practices. Her approval was required for any and all appointments, and she personally signed the personnel action form approving each such appointment. With respect to this category of personnel decision, Yee operated as the final arbiter of municipal policy, who interpreted and applied policy according to the standards of her department, and she was effectively at the apex of policymaking authority.[9] The termination of the provisional pool, from which Harman hoped to be

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[8] Harman maintains that provisional appointments "are not governed by the Civil Service Commission," but the San Francisco Charter clearly places provisional appointments under the authority of the civil service commission. Charter section 10.101, cited above, expressly includes provisional appointments among the personnel decisions under the authority of the civil service commission, and section 10.104 does not list this category of appointments among those that are excluded from the civil service system.

[9] The parties have not elucidated the precise steps in the delegation of authority to the EEO Manager. Yee herself testified that she reported to Andrea Gourdine, the Director of Human Resources. In the absence of briefing on the question, we rely on the evidence in the record establishing Yee's final policymaking authority with respect to provisional appointments.

promoted, was compelled by the lengthy process of justifying to Yee the appointment of Robert, the last appointment from the pool. Thus, the harm that Harman suffered from his one-year delay in promotion can be traced to the delegated policymaking authority over provisional appointments exercised by Yee as EEO Manager.

In contrast, Harman argues that the Airport management itself possessed final policymaking authority over the personnel actions that led to the delay in his promotion. The argument finds scant support in San Francisco municipal law and founders on a mass of evidence produced at trial. The argument for Airport autonomy labors in the face of the undisputed facts that the Airport operated within the civil service system of the City and that Charter section 10.101 confers on the civil service commission the power to adopt "rules, policies, and procedures" governing the civil service system. Plaintiff cites the Charter of the City and County of San Francisco section 4.115[10] and San Francisco Administrative Code section 2A.170,[11] which give the Airport commission a

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[10] Section 4.115 of the Charter of the City and County of San Francisco provides: "The [Airport] Commission shall have charge of the construction, management, supervision, maintenance, extension, operation, use and control of" the Airport.

[11] Section 2A.170 of the Charter provides: "The Airport Commission shall have all the powers and duties in the possession, management, supervision, operation, use, maintenance, extension and control of the San Francisco International Airport

(Continued on following page)

measure of operational autonomy, but these broad grants of operational powers plainly do no take the Airport out of the civil service system or displace the authority of the civil service commission over the administration of all nonexempt employees in the City.

As the plaintiff observes, San Francisco Administrative Code section 2A.30 does give department heads decisionmaking authority over temporary appointments,[12] but this provision does not preclude the routine approval of provisional appointments by the central EEO Manager, and it clearly cannot be construed as delegating policymaking authority to all department heads. Such an interpretation would effectively eliminate the power of municipal government to establish consistent city-wide policies.

As the City argues, San Francisco Civil Service Commission Rules, rule 3, section 3.3.1 [Purpose] broadly confers on "any employee" the right to file a complaint of discrimination resulting from "any employment decision made by any agency, department, or commission of the City and County of San

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and of all other airport properties wherever situated as it may acquire or which may be placed under its control."

[12] Section 2A.30 of the Charter provides in pertinent part: "Non-civil service appointments and any temporary appointments in any department or subdivision thereof, and all removals therefrom shall be made by the department head, bureau head or other subdivision head designated as the appointing officer.

Francisco." The procedures governing discrimination complaints thus gave Airport employees the final recourse of an appeal to the civil service commission. (See San Francisco Civil Service Commission Rules, rule 3, § 3.6.4(9) [Discrimination Complaint Process].)

The trial record confirms our analysis of the San Francisco Charter and Administrative Code. The Airport's Human Resources Manager, Rafael Centeno, described his department as one of the City's "large decentralized human resources departments," but he made clear that he reported to, and was reviewed by, the central human resources department, and he identified Andrea Gourdine, the City's Director of Human Resources, as his superior. The Deputy Airport Director for Administration, Theresa Lee, testified that she communicated with the human resources department of the City "on policy clarification" and that, like all City departments, the Airport has "to comply with" directives of the City's central human resources department. Correspondence between Andrea Gourdine, the City's Human Resources Director and John Martin, the Airport Director, illustrated the supervisory role of the central human resources department. Gourdine wrote "to reiterate that the Airport must comply with the human resources director's policies and procedures concerning provisional hiring" governing provisional appointments to the 9220 Airport Operations Supervisor position. Martin replied with a lengthy justification of the Airport's actions and assured her that he had "attempted to embrace the letter and the spirit of

these policies." As noted earlier, the record abundantly reveals the supervisory role of the City's central human resources department, acting through the EEO Manager, in making provisional appointments.

Alternatively, the plaintiff argues he proved a custom of racial preference that would establish a cause of action under section 1983 in the absence of an official policy. But the standard for proof of a custom under section 1983 is very high: "For purposes of § 1983, a 'custom' is a legal institution that is permanent and established, but is not authorized by written law. [Citation.] Before a custom can be the basis for a civil rights violation, the custom must be "so permanent and well settled as to constitute a 'custom or usage' with the force of law." (*Feliciano v. City of Cleveland, supra,* 988 F.2d 649, 655; see *Monell, supra,* 436 U.S. 658, 691; *Doe v. Claiborne County, Tenn., supra,* 103 F.3d 495, 507-508.)

We do not consider that, under this standard, the record contains evidence of a custom of racial discrimination against White males in this job classification. The City had earlier terminated its affirmative action program. The provisional pool for appointment to the position of 9220 Airport Operations Supervisor contained the names of seven White employees, three of whom were promoted to the position, including two male employees. Although a Pacific Islander, Dennis Neves, received the next promotion to the position, the record reveals White males fared well in subsequent appointments to the position. At the time of

trial, seven of the eight employees in the 9220 position were White and six of the White employees were male.

Our analysis leads to separate conclusions with respect to the two personnel actions at issue – the termination of the provisional pool and the acting appointment. We consider that the EEO Manager, Dorothy Yee, exercised an authority over provisional appointments that was closely analogous to the authority that the county prosecutor in *Pembaur* possessed over police practices affecting Fourth Amendment rights. In either case, the official was the final arbiter of municipal policy in a particular, narrow area of municipal administration. We emphasize that the critical consideration under *Monell* is not that Yee had final decisionmaking authority but rather that she effectively formulated and applied municipal policy with respect to provisional appointments. Yee claimed that she was governed by vaguely described policies and rules of the civil service commission and the human resources director, but, as in the case of the county prosecutor, it is unnecessary to identify a precise policy statement, law or custom that governed her decision. She qualifies as a final policy maker under *Pembaur* because she effectively "possess[ed] final authority to establish municipal policy" (*Pembaur v. Cincinnati, supra,* 475 U.S. 469, 481 (plur. opn. of Brennan, J.)) with respect to approval of provisional appointments by making "a considered decision based on [her] understanding of the law. . . ." (*Id.* at p. 484 (plur. opn. of Brennan, J.).)

We reject counsel's suggestion at oral argument that Yee acted as a rogue employee in pushing management to hire minority employees. The delegation of policymaking authority to Yee constituted an established practice in the processing of provisional appointments at the Airport. The record reveals that, as a matter of standard procedure, the Airport referred all provisional appointments for her review and approval with respect to policies bearing on the racial and ethnic composition of the workforce.

The City calls our attention to the broad language in the San Francisco Civil Service Commission Rules, rule 3, section 3.3.1 authorizing employees to complain of any discriminatory decision and ultimately to appeal the decision to the civil service commission. These procedures, it argues, subjected the EEO Manager to the oversight of higher authorities in reviewing provisional appointments. But the complaint procedures offered an illusory remedy to an employee, such as Harman, who might be aggrieved by announcement of a new provisional selection process that effectively eliminated his chance of promotion from an existing provisional pool. There were no rules governing the duration of a provisional pool, and with new hires, transfers and promotions, a pool tended to rapidly lose its value as a representative list of potential candidates for promotion. Under these circumstances, the EEO Manager's power to delay an appointment was effectively a power to terminate the pool by allowing it to become unrepresentative. An employee, such as Harman, who hoped

to be promoted from an existing pool, could not assert a right to continued use of an existing pool, or complain of a new provisional selection process that eliminated the existing pool, without finding himself in the untenable position of urging use of an increasingly unrepresentative list.

In contrast, we consider that the acting appointment comes within *Praprotnik* and the line of authority holding that discretionary authority to hire, promote or discharge employees is not sufficient to establish a basis for municipal liability under *Monell.* (*Greensboro Prof. Fire Fighters Ass'n v. Greensboro, supra,* 64 F.3d 962, 965; *Gillette v. Delmore, supra,* 979 F.2d 1342, 1350; *Auriemma v. Rice, supra,* 957 F.2d 397, 401.) The evidence discloses that the Airport management exercised final decisionmaking power in making the temporary appointment but it does not establish that the officials participating in the decision – the Airport human resources staff and the supervisors in the operations department – possessed final policymaking authority or implemented a municipal policy or custom causing a constitutional violation. (*Monell, supra,* 436 U.S. 658, 694.) Moreover, unlike the cancellation of the provisional pool, the temporary appointment was an appropriate subject for the grievance procedure that would have required the Airport to justify the appointment under City policy established by the civil service commission. We do not find here the factors that rendered the grievance procedure illusory in the case of the termination of the provisional pool.

3. Instructional Issues

The City maintains that, even if the evidence satisfied *Monell* with respect to the termination of the provisional pool, the jury's verdict was vitiated by instructional error.

The identification of policymaking officials is an inquiry "dependent on an analysis of state law." (*McMillian v. Monroe County* (1997) 520 U.S. 781, 786 [138 L.Ed.2d 1, 117 S.Ct. 1734]; *St. Louis v. Praprotnik, supra,* 485 U.S. 112, 124 (plur. opn. of O'Connor, J.).) Drawing the necessary implication from this premise, *Jett v. Dallas Independent School Dist., supra,* 491 U.S. 701, makes clear that the trial court should identify the "officials or governmental bodies who speak with final policymaking authority" (*id.* at p. 737) and instruct the jury that it must determine whether the decisions of these officials or governmental bodies caused the constitutional injury: "the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury. Reviewing the relevant legal materials, . . . the trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue. Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the

deprivation of rights at issue by policies which affirmatively command that it occur, . . . " (*Ibid.*; see also *Christie v. Iopa* (9th Cir. 1999) 176 F.3d 1231, 1235; *Los Angeles Police Protective League v. Gates* (9th Cir. 1990) 907 F.2d 879, 889-890.)

Consistent with this procedural rule, the City requested the court to instruct the jury that the civil service commission "is the official policy-making body of the City and County of San Francisco with respect to personnel matters." The trial court did not deliver the requested instruction or identify any other policymaking officials or governmental bodies speaking "with final policymaking authority." (*Jett v. Dallas Independent School Dist., supra,* 491 U.S. 701, 737.) The court, however, did instruct the jury that it must find that "an official policy or custom of the City and County of San Francisco was a moving force behind" a constitutional deprivation and offered brief definitions of official policy. In the special verdict, the jury responded affirmatively to the question whether the City has "an official policy or custom to intentionally discriminate against [W]hite males."

In this appeal, the City assigns error only to the failure to identify the final policy maker as required by *Jett.* In general, "instructional error requires reversal only '"where it seems probable" that the error "prejudicially affected the verdict."' [Citation.] The reviewing court should consider not only the nature of the error, 'including its natural and probable effect on a party's ability to place his full case before the jury,' but the likelihood of actual prejudice

as reflected in the individual trial record, taking into account '(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' [Citation.]" (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983 [67 Cal.Rptr.2d 16, 941 P.2d 1203].)

Preliminarily we note that it is material only whether an instruction identifying the policy maker was needed with respect to termination of the provisional pool. This personnel decision alone is sufficient to support the verdict of damages for Harman's delay in promotion, and plaintiff failed to present evidence that would sustain a verdict based on the acting appointment, the other personnel decision affecting the delayed promotion.

We do not find prejudicial error in the trial court's refusal to give the City's requested instruction locating final policymaking authority in the civil service commission. While this commission is an important source of municipal policy in personnel matters, the pertinent issue regarding the termination of the provisional pool concerned the policymaking authority of the EEO Manager, Dorothy Yee. Under *Pembaur* it was not necessary to show that Yee relied on policy promulgated by the civil service commission or other official or governmental body. It is enough to prove that she acted as a final arbiter of policy with respect to this category of appointments.

While the trial court erred in failing to identify the EEO Manager as a final policy maker for provisional appointments at the Airport, we consider that the error was not prejudicial to the City. (*Los Angeles Police Protective League v. Gates, supra,* 907 F.2d 879, 890.) The court clearly instructed the jury that it must find an official policy as the moving force of any constitutional violation and the jury explicitly found such an offensive official policy. The identification of the EEO Manager as a final policy maker would have facilitated the jury's deliberations in finding this requisite official policy, but we do not think it would have given the City any further line of defense or altered the jury's consideration of the evidence.

We give little weight to the City's argument that the absence of the policy maker identification allowed the plaintiff to parade before the jury a document of distinctly secondary importance, the diversity staffing plan. As noted earlier, this plan was relevant evidence of the kind of policy that pervaded the City's personnel administration and thus provided a context for Harman's strongest evidence – Yee's memorandum dated December 17, 1998, recording an intention to push Lamont Foster to choose a minority for the next appointment. The City has not shown that the plaintiff's use of the diversity staffing plan misled the jury by presenting an inaccurate or distorted view of policies guiding Yee in her review of provisional appointments.

C. Attorney Fees

1. Legal Overview

Harman claims the right to attorney fees under the Civil Rights Attorney's Fees Awards Act of 1976, codified in 42 United States Code section 1988 (hereafter section 1988). The statute provides that in an action to enforce a provision of designated civil rights statutes, including section 1983, "the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs. . . ." "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances. [Citation.] Accordingly, a prevailing plaintiff '"should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."' [Citations.]" (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 429 [76 L.Ed.2d 40, 103 S.Ct. 1933]; *Casey v. City of Cabool, Mo.* (8th Cir. 1993) 12 F.3d 799, 805.) As the term "prevailing party" has been construed, plaintiffs may be considered a "prevailing party" if they "'succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' [Citation.]" (*Hensley v. Eckerhart, supra,* at p. 433; *Texas Teachers Assn. v. Garland School Dist.* (1989) 489 U.S. 782, 791-792 [103 L.Ed.2d 866, 109 S.Ct. 1486].)

The legislative history of section 1988 alludes to the 12 factors set forth in *Johnson v. Georgia Highway Express, Inc.* (5th Cir. 1974) 488 F.2d 714, as appropriate considerations bearing on the reasonableness of

the fee. (See also *Kerr v. Screen Extras Guild, Inc.* (9th Cir. 1975) 526 F.2d 67, 69-70.)[13] These 12 factors have continued relevance in guiding judicial discretion, but they have been subsumed by the analysis known as the lodestar method of determining fees. Under this familiar method, "[t]he initial estimate of a reasonable attorney's fee is . . . calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. [Citation.] Adjustments to that fee then may be made as necessary in the particular case." (*Blum v. Stenson* (1984) 465 U.S. 886, 888 [79 L.Ed.2d 891, 104 S.Ct. 1541].)

In *Hensley v. Eckerhart, supra,* 461 U.S. 424, the court addressed the issues affecting the determination of the fee "where a plaintiff is deemed 'prevailing' even though he succeeded on only some of his claims for relief." (*Id.* at p. 434.) The court required a two-part analysis: "In this situation two questions must be addressed. First, did the plaintiff fail to prevail on

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[13] As summarized in *Hensley,* the factors are: "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." (*Hensley v. Eckerhart, supra,* 461 U.S. 424, 430, fn. 3.)

claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" (*Ibid.*) The court concluded that, "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." (*Id.* at p. 440.)

The court revisited the issue of setting a fee award to reflect partial or limited success in *Riverside v. Rivera* (1986) 477 U.S. 561 [91 L.Ed.2d 466, 106 S.Ct. 2686], (plur. opn. of Brennan, J.) and *Farrar v. Hobby* (1992) 506 U.S. 103 [121 L.Ed.2d 494, 113 S.Ct. 566]. Though *Farrar* concerned the narrow issue of a plaintiff's entitlement to attorney fees based on the recovery of nominal damages, it has been construed by many federal courts as signaling a shift in emphasis in awarding fees under section 1988 that more closely reflects the concurring opinion of Justice Powell in *Riverside.*

In federal courts, awards of attorney fees under section 1988 "are generally reviewed for an abuse of discretion. [Citation.] However, [the courts] only arrive at discretionary review if [they] are satisfied that the correct legal standard was applied and that none of the district court's findings of fact were clearly erroneous. [Citation.] If the parties contend the district court made a legal error in determining the fee award, then *de novo* review is required." (*Thomas v. City of Tacoma* (9th Cir. 2005) 410 F.3d

644, 647; *Hopwood v. State of Texas* (5th Cir. 2000) 236 F.3d 256, 277; *Morales v. City of San Rafael* (9th Cir. 1996) 96 F.3d 359, 362.)

To facilitate the review of judicial discretion, *Hensley* requires the lower court "to provide a concise but clear explanation of its reasons for the fee award. When an adjustment is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained." (*Hensley v. Eckerhart, supra,* 461 U.S. 424, 437.) Thus, in *Corder v. Brown* (9th Cir. 1994) 25 F.3d 833, 837, the court remanded an attorney fee award where "the district court did not address the limited success issue at all. . . ." Plaintiff argues that California courts do not require a statement of decision with regard to fee awards (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140 [104 Cal.Rptr.2d 377, 17 P.3d 735]; *Rebney v. Wells Fargo Bank* (1991) 232 Cal.App.3d 1344, 1349 [284 Cal.Rptr. 113],) but, in reviewing a federal remedy, it is reasonable to insist on a record adequate to allow a meaningful review of federal standards governing the remedy. (See *Cunningham v. County of Los Angeles* (9th Cir. 1988) 879 F.2d 481, 484; *Phelps v. Hamilton* (10th Cir. 1997) 120 F.3d 1126, 1129.)

2. Unreasonable and Unrelated Charges

The City presents an array of objections to the effect that the fee award includes charges for legal services having little or no connection to the modest recovery of damages that Harman ultimately secured. We will briefly review the disputed portions of the award and then consider the legal basis for the City's challenge.

Harman's motions for attorney fees include extensive billings for work in the federal court proceedings. The record shows that, shortly after filing their complaint in the Northern District of California, the three original plaintiffs moved for a preliminary injunction to restrain employment practices at the Airport. The City countered with a motion for the federal court to abstain from exercising jurisdiction over Proposition 209 claims since a major case interpreting the measure, *Hi-Voltage Wire Works, Inc. v. City of San Jose, supra,* 24 Cal.4th 537, was then pending before the California Supreme Court. When the District Court ruled for the City on both issues, plaintiffs appealed to the Ninth Circuit Court of Appeals, which issued an inconclusive ruling that caused plaintiffs to file an amended complaint in state court and to abandon the federal proceedings.

In the two posttrial motions, Harman claimed a total of $167,575 for legal services in federal court proceedings. We do not find in the motions any explanation of the relationship between the federal court proceeding and his recovery of damages. Instead,

Harman defends the charges by pointing out that the fee requests excised or discounted a substantial portion of the charges in this stage of the proceeding. For example, attorney Sharon Browne, claimed only 50 percent of the hours spent during this stage in the litigation. The City maintains that Harman has failed to show that *any* portion of legal services in this stage of the litigation contributed to his eventual recovery of damages for the one-year delay in promotion.

Prior to issuance of our decision in the prior appeal on April 23, 2003, Harman's claim for damages competed for counsel's attention with the claims of two other plaintiffs and with the ongoing effort to obtain equitable relief. In this appeal, he emphasizes that the motions for attorney fees both omitted services related to Proposition 209, a motion for preliminary injunction, an early demurrer concerning exhaustion of administrative remedies, and certain other matters. The City calculates, however, that Harman seeks compensation for 90 percent of the attorneys' time on discovery in the case and argues that this high percentage necessarily includes much work on the suit for equitable relief and damages claimed by the other two plaintiffs.

More specifically, the City notes that the motions for attorney fees include services in the state court proceedings for a period of over a year between December 1999 and April 18, 2001, before the complaint was amended to state the damage claim on which Harman ultimately prevailed. The motions also include time for discovery proceedings relating to

personnel policies after April 12, 1999, the date that Neves was appointed. Since Harman's delay in promotion was effectively determined by that time, the discovery necessarily related to other failed claims. As an alternative, the City proposes a formulaic reduction in the fee by two-thirds for the period when Harman was one of three plaintiffs and asks that certain travel expenses and duplicative billings be excised from the award.

These portions of the award are subject to challenge on two overlapping legal grounds. In either case, our analysis begins with the seminal decision of *Hensley v. Eckerhart, supra,* 461 U.S. 424. The *Hensley* court instructs that the initial lodestar calculation should exclude "hours that were not 'reasonably expended.'" (*Id.* at p. 434.) The Supreme Curt [sic] then proceeds with an analysis of reasonable charges that draws from an analogy to private billing practices: "Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. 'In the private sector, "billing judgment" is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.' [Citation.]" (*Ibid.*)

We note that "[s]ection 1988 makes the prevailing *party* eligible for a discretionary award of attorney's

fees." (*Venegas v. Mitchell* (1990) 495 U.S. 82, 87 [109 L.Ed.2d 74, 110 S.Ct. 1679].) This form of the statute supports the *Hensley* analogy to private billing practices. The analogy, moreover, has been followed in other cases. Thus, *Casey v. City of Cabool, Mo., supra,* 12 F.3d 799, 805, instructs that "counsel for prevailing parties should be paid, as is traditional for attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" *Norman v. Housing Authority of City of Montgomery* (11th Cir. 1988) 836 F.2d 1292, 1301, interprets *Hensley* to "mean that the hours excluded are those that would be unreasonable to bill to a client and therefore to one's adversary irrespective of the skill, reputation or experience of counsel." [Italics omitted.]

If questioned charges are included in the initial lodestar calculation, they are then subject to challenge under *Hensley* as being unrelated to the plaintiff's successful claims. As noted earlier, *Hensley* directs the court to consider whether the plaintiff failed "to prevail on claims that were unrelated to the claims on which he succeeded?" (*Hensley v. Eckerhart, supra,* 461 U.S. 424, 434.) Counsel's work on such unsuccessful and unrelated claims "cannot be deemed to have been 'expended in pursuit of the ultimate result achieved[']... and therefore no fee may be awarded for services [on such claims]." (*Id.* at p. 435.) The court recognizes that "there is no certain method of determining when claims are 'related' or 'unrelated,'" (*id.* at p. 437, fn. 12) but it instructs the court to inquire whether the "different claims for relief...

are based on different facts and legal theories." (*Id.* at p. 434.) If so, they qualify as unrelated claims. Conversely, related claims "will involve a common core of facts or will be based on related legal theories." (*Id.* at p. 435.)

While the courts have sometimes applied the *Hensley* distinction without elaboration (see *Corder v. Gates* (9th Cir. 1991) 947 F.2d 374, 379), we find other authority that attempts to give the distinction greater precision. In *Webb v. Sloan* (9th Cir. 2003) 330 F.3d 1158, 1168, the court emphasizes that the concept of a related *Hensley* claim embraces claims that involve "a common core of facts *or*[, alternatively,] are based on related legal theories." The Seventh Circuit in *Mary Beth G. v. City of Chicago* (7th Cir. 1983) 723 F.2d 1263, followed by a line of Ninth Circuit decisions, suggests that "a useful tool for making this determination is to focus on whether the claims seek relief for essentially the same course of conduct. Under this analysis, an unsuccessful claim will be *un*related to a successful claim when the relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised." (*Id.* at p. 1279; see *Schwarz v. Secretary of Health & Human* [sic] (9th Cir. 1995) 73 F.3d 895, 903 [surveying cases]; *O'Neal v. City of Seattle* (9th Cir. 1995) 66 F.3d 1064, 1068-1069; *Odima v. Westin Tucson Hotel* (9th Cir. 1995) 53 F.3d 1484, 1499; *Thorne v. City of El Segundo* (9th Cir. 1986) 802 F.2d 1131, 1141.) In the present case,

relief was granted on the basis of the course of conduct of the EEO Manager in approving provisional appointments. The *Mary Beth* test would focus on whether work expended on the unsuccessful claims was intended to remedy a separate course of conduct.

Other authority inquires whether work performed on the unsuccessful claims "aided the work done on the merits of the [successful claim]." (*Herrington v. County of Sonoma* (9th Cir. 1989) 883 F.2d 739, 747.) The test may lead to a narrow or broad application of the statutory entitlement to fees. In *Perkins v. Cross* (8th Cir. 1984) 728 F.2d 1099, 1100, counsel defended plaintiffs in a misdemeanor prosecution before bringing suit under section 1983. The court allowed attorney fees for the criminal defense only "to the extent, if any, that research or investigation done in connection with that proceeding proved directly relevant to the successful prosecution of the later civil rights claims. . . ." In contrast, *Cabrales v. County of Los Angeles* (9th Cir. 1991) 935 F.2d 1050 allowed attorney fees in an unsuccessful opposition to a petition for writ of certiorari to the United States Supreme Court. Noting that the plaintiff's judgment was reinstated after remand, the court held: "If a plaintiff ultimately wins on a particular claim, she is entitled to all attorney's fees reasonably expended in pursuing that claim – even though she may have suffered some adverse rulings." (*Id.* at p. 1053.)

3. Limited Success

The City's principal objections to the attorney fees award pertain to plaintiff's limited success in the litigation. While recognizing the need to avoid double counting (*Cunningham v. County of Los Angeles, supra,* 879 F.2d 481, 487), it relies on the same record that we have reviewed above, arguing that, if hours spent on unsuccessful claims are not excised from the award as unreasonable or unrelated expenses, they should be taken into account in assessing the results obtained in relation to the hours expended.

The City also calls our attention to other portions of the record that relate more directly to the issue of limited success. The plaintiff claims $41,892 for hours expended in opposing the City's motion for summary judgment and $131,382 for work on appeal from the summary judgment. Our previous decision, however, affirmed in most respects the summary judgment in favor of the City, allowing the action to proceed only with respect to Harman's claim of damages under section 1983 for a one-year delay in promotion. The City also maintains that the settlement record is relevant to the issue of the plaintiff's degree of success. Approximately one month before trial, the City offered to settle the case for $25,000. Plaintiff rejected the offer and countered with a demand for $600,000 plus attorney fees. The fee award now includes the sum of $247,903 for hours spent at trial, which secured a judgment only $5,000 more than the settlement offer. Finally, the City argues that the ratio of

36 to 1 between the damages and the attorney fee award is incompatible with recent federal decisions.

Our analysis of governing law again begins with *Hensley* where the Supreme Court noted that the *Johnson* factors for evaluating the reasonableness of an award include consideration of "the amount involved and the results obtained." (*Hensley v. Eckerhart, supra,* 461 U.S. 424, 430, fn. 3.) The trial court "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." (*Id.* at p. 435.) The court may appropriately reduce the lodestar calculation "if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." (*Id.* at p. 440.) The decision emphasized, "the most critical factor is the degree of success obtained." (*Id.* at p. 436.)

In *Riverside v. Rivera, supra,* 477 U.S. 561, the appellants challenged an award of attorney fees under section 1988 on the ground that "it was disproportionate to the amount of damages recovered [by plaintiffs]." (*Id.* at p. 567 (plur. opn. of Brennan, J.).) The case was filed by eight Chicano individuals who attended a party that was broken up by a large group of police officers. They named as defendants the City of Riverside and 31 individual police officers, alleging that the police officers acted without a warrant, used unnecessary force, and arrested four persons without probable cause. The jury returned a total of 37 verdicts against the City and five individual officers in the total amount of $33,350.

The district court granted attorney fees of $245,456 and supported the award with detailed findings following the remand from an earlier appeal. The district court found that all claims were related and plaintiffs acted reasonably in naming numerous defendants because of the difficulty in determining which officers did what. The court found that the defendants' unlawful acts were, in many cases, "'motivated by a general hostility to the Chicano community,' . . . and that [the] litigation therefore served the public interest: [¶] 'The institutional behavior involved here . . . had to be stopped and . . . nothing short of having a lawsuit like this would have stopped it. . . .' [Citation.]" (*Riverside v. Rivera, supra,* 477 U.S. 561, 574 (plur. opn. of Brennan, J.).)

A plurality decision of four justices rejected "the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." (*Riverside v. Rivera, supra,* 477 U.S. 561, 574 (plur. opn. of Brennan, J.).) Concluding that the district court had properly applied *Hensley,* the decision approved its consideration of the public benefit of the suit: "a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms . . . [and] often secures important social benefits that are not reflected in nominal or relatively small damages awards." (*Id.* at p. 574 (plur. opn. of Brennan, J.).)

In a concurring opinion, Justice Powell cited the *Hensley* dictum that "'the degree of success'" is "'the

most critical factor'" in determining fee awards and expressed the view that "[w]here recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." (*Riverside v. Rivera, supra,* 477 U.S. 561, 585.) He noted that the attorney fees were seven times the amount of the damage award and stated in a footnote that "[i]t probably will be the rare case in which an award of *private damages* can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case." (*Id.* at p. 586, fn. 3 (conc. opn. of Powell, J.).)

Farrar v. Hobby, supra, 506 U.S. 103, arguably lends a degree of authority to Powell's concurring opinion. The issue on appeal was the propriety of awarding attorney fees under section 1988 where a plaintiff receives only nominal damages. The court held that the plaintiff was technically eligible for an award as a prevailing party but the district court, in the exercise of its discretion, properly declined to award attorney fees: "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief [citation], the only reasonable fee is usually no fee at all." (*Farrar, supra,* at p. 115.)

The *Farrar* holding indirectly supports the consideration of proportionality between damages and the award of attorney fees, and the decision contains language with a similar import. The decision

noted that under *Hensley* "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" (*Farrar v. Hobby, supra,* 506 U.S. 103, 114.) Then, giving reasonableness a monetary context, the Court quoted the critical language in Justice Powell's concurring opinion in *Riverside* to the effect that a district court must "'give primary consideration to the amount of damages awarded as compared to the amount sought.'" (*Farrar, supra,* at p. 114.)

In our review of the decisional law, we find that federal decisions after *Farrar* often display a marked restraint in approving attorney fee awards in amounts that constitute a high multiple of damages. This restraint is evident, for example, in *Corder v. Brown, supra,* 25 F.3d 833, 841, where the plaintiff recovered damages of $24,006 against three of a large cast of original defendants. The court remanded an attorney fee award of $240,695 "to reconsider the limited success issue in light of *Farrar.*" In *Migis v. Pearle Vision, Inc.* (5th Cir. 1998) 135 F.3d 1041, 1048, the court observed that an attorney fee award of $81,000 was "over six and one-half times the amount of damages awarded," i.e., $12,233, and this ratio was "simply too large to allow the fee award to stand." In *Dannenberg v. Valadez* (9th Cir. 2003) 338 F.3d 1070, 1071, the plaintiff recovered $9,000 in damages and only part of his desired injunctive relief but was awarded his requested attorney fees of $57,566. Vacating the award, the court held that "the district court did not properly consider [his] degree of

success in arriving at a reasonable fee award." (*Id.* at p. 1076.) Again, *Cole v. Wodziak* (7th Cir. 1999) 169 F.3d 486, the court approved the action of the district court in setting an award at $13,336 – approximately three times the damages of $4,500. The original fee demand of $85,000 the court regarded as clearly excessive: "A fee 19 times the damages, which plaintiffs sought, is off the map." (*Id.* at p. 488.)

Two decisions offer a certain parallel to the present case in that the plaintiffs vigorously sought equitable relief and recovered only small judgments for damages. In *Gumbhir v. Curators of University of Missouri* (8th Cir. 1998) 157 F.3d 1141, the plaintiff sought "sweeping injunctive relief" for employment discrimination and violation of First Amendment rights in the workplace and succeeded in recovering $8,846.40 in lost wages and benefits. The court reduced an attorney fee award of $110,000 to $46,750 with the observation: "Gumbhir did not succeed on his claims for institutional equitable relief. He prevailed on only one of his personal damage claims." (*Id.* at p. 1147.) In *Betancourt v. Giuliani* (S.D.N.Y. 2004) 325 F.Supp.2d 330, the plaintiff brought a broad challenge to New York City's policy of removing the homeless from public spaces but recovered only $15,000 for an abusive strip search. The district court cut the requested fee by 90 percent in view of the plaintiff's "minimal success" in changing law enforcement policy and granted an award of $55,976.19. (*Id.* at pp. 334-335.)

The court in *Moriarty v. Svec* (7th Cir. 2000) 233 F.3d 955, 968, takes a somewhat more liberal position by emphasizing that proportionality is one consideration among others. There the plaintiff was awarded fees of $60,000 for a phase of litigation in which he recovered damages of $2,389. Remanding the fee award, the court stated, "While such disproportionality is not determinative . . . the district court's fee order should evidence increased reflection before awarding attorney's fees that are large multiples of the damages recovered. . . ." (*Ibid.*) Similarly, in *McGinnis v. Kentucky Fried Chicken of California* (9th Cir. 1995) 51 F.3d 805, the plaintiff recovered compensatory damages of $34,000 and punitive damages $200,000. (*Id.* at p. 807.) After reversing the punitive damages (*id.* at p. 808), the court remanded the case for reconsideration of the attorney fees and costs award of $148,000. The court acknowledged that plaintiffs may properly recover more than the benefit to their client where "they also confer benefits on others throughout society by winning a civil rights claim. But the benefit is not infinite. What the lawyers do for their actual client is an important measure of 'extent of success.' The district court must reduce the attorneys fees award so that it is commensurate with the extent of the plaintiff's success." (*Id.* at p. 810; see also *Green v. Torres* (2d Cir. 2004) 361 F.3d 96 [with damages of $58,508, the court reduced fee award of $274,485 by a modest 20 percent]; *Larez v. Holcomb* (9th Cir. 1994) 16 F.3d 1513, 1523 [lower damage award should not necessarily lead to a reduced attorney fees award].)

The City draws our attention to authority that the "courts may consider a plaintiff's refusal of a settlement offer as one of several proportionality factors guiding their exercise of discretion. . . ." (*Sheppard v. Riverview Nursing Center, Inc.* (4th Cir. 1996) 88 F.3d 1332, 1337.) We find that the decisional law is by no means consistent on this point. Other authority cautions that "'a party's declining settlement offers should [not] operate to reduce an otherwise appropriate fee award.'" (*Ortiz v. Regan* (2nd Cir. 1992) 980 F.2d 138, 141; see also *Berkla v. Corel Corp.* (9th Cir. 2002) 302 F.3d 909, 922; *Cooper v. State of Utah* (10th Cir. 1990) 894 F.2d 1169, 1172.) But the record here displays a significant disproportionality between the attorney fee claimed for trial work, i.e., $247,903, and the additional recovery secured by trial, i.e., $5,000 more than the settlement offer. Under such circumstances, we consider that the trial court may properly consider the settlement offer in evaluating the benefit to plaintiff of the attorney's services at trial. (*Moriarty v. Svec, supra,* 233 F.3d 955, 967.)

Offsetting the general pattern of restraint, we find other cases citing the public benefit as justifying fees that well exceed the benefit to a private client. In *Morales v. City of San Rafael, supra,* 96 F.3d 359, the plaintiff sought $139,783 in attorney fees in a case where he recovered $17,500 in damages but the district court relied on *Farrar* to set the award at $20,000. Vacating the award, the court remanded the case for a new fee determination recognizing that

"[s]uccess is measured not only by the amount of the recovery but also in terms of the significance of the legal issue on which the plaintiff prevailed and the public purpose the litigation served." (*Id.* at p. 365.) As we are reminded by *Norman v. Housing Authority of City of Montgomery, supra,* 836 F.2d 1292, 1302, "[t]he vindication of a constitutional right is important even if only a small amount of money is involved." (See also *Riverside v. Rivera, supra,* 477 U.S. 561, 574 (plur. opn. of Brennan, J.); *Thomas v. City of Tacoma, supra,* 410 F.3d 644, 648 [reversing order denying attorney fees in reliance on *Farrar*]; *Gay Officers Action League v. Puerto Rico* (1st Cir. 2001) 247 F.3d 288, 295 [vindication of First Amendment justifies award]; *Phelps v. Hamilton, supra,* 120 F.3d 1126, 1132-1133 [public interest in invalidation of state statute justifies award]; compare: *County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 304 [87 Cal.Rptr.2d 441, 981 P.2d 68], fn. 2; *Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 325 [103 Cal.Rptr.2d 339].)

We note, however, that the public benefit in the case at bar is circumscribed by the scope of the adjudication. Our review of the evidence revealed that Harman succeeded only in challenging the conduct of the EEO Manager in approving provisional appointments at the Airport. He cannot reasonably claim a significant public benefit in an alleged institutional impact that exceeds the scope of his proof at trial.

4. Remand

On the record presented in this appeal, we conclude that the trial court did not properly consider the standards governing the award of attorney fees under section 1988. We remand to give the court an opportunity to consider the determination of a reasonable fee. The court should recalculate the lodestar figures applying the proper standards of reasonableness. Then, it must adjust the fee to reflect the plaintiff's limited success by pursuing the two-step analysis dictated by *Hensley*. First, it should exclude hours expended on claims that are unrelated to the claim of damages on which Harman succeeded at trial. Secondly, it must reduce the award to reflect the limited nature of Harman's relief in comparison with the scope of the litigation as a whole. As instructed by *Hensley*, the court "may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." (*Hensley v. Eckerhart, supra,* 461 U.S. 424, 436-437.) When it recalculates the attorney fee award, the court must articulate a clear explanation of its reasoning in light of the authority surveyed in this opinion so as to facilitate meaningful appellate review. We express no opinion as to the amount of fees that the court should award. That amount is left to the trial court's sound discretion to be exercised in view of the governing standards we have set forth.

DISPOSITION

The judgment for damages is affirmed. The award of attorney fees is vacated and the case remanded for further proceedings consistent with this opinion. Each party shall bear its costs on appeal.

Swager, J.

We concur:

Marchiano, P. J.

Margulies, J.

SUPERIOR COURT OF
THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO COUNTY

STEPHEN E. CHERESNK, ALLEN HARMAN, and JOHN L. MCGOLDRICK, Plaintiffs, vs. CITY AND COUNTY OF SAN FRANCISCO, et al. Defendants.	/ CASE NO. 411379 / RULING ON PLAINTIFF'S MOTION FOR ATTORNEYS FEES PURSUANT TO 42 U.S.C. § 1988 (Filed Dec. 29, 2006)

The motion by Plaintiff for an award of attorneys fees pursuant to 24 U.S.C. section 1988 as the prevailing party came regularly before Department 41 of the above-entitled court, The Honorable Thomas McGinn Smith, on 7 December 2004. Plaintiff was represented by his attorneys of record, Paul Beard and Andrea Miller. Defendant was represented by its attorney of record, Joseph Quinn. At the end of the arguments, the matter was submitted to the Court.

After due consideration of all of the moving and opposing papers filed relative to the motion and the oral arguments made at the hearing, and good cause appearing.

The Court finds reasonable, after due consideration of the success obtained relative to the relief sought and the other circumstances of this case, and

awards to Plaintiff $1,095,202.90 ($382,050.23 as to Miller and $713,152.75 as to Pacific Legal Foundation).

Dated: 12/29/04 /s/ Thomas McGinn Smith
Thomas McGinn Smith

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

STEFAN E. CHERESNIK et al., Plaintiffs and Appellants, v. CITY AND COUNTY OF SAN FRANCISCO et al., Defendant and Respondents.	A098415 (San Mateo County Super. Ct. No. 411379)

(Filed Apr. 23, 2003)

In this suit for damages and equitable relief based on alleged employment discrimination, the plaintiffs, Stefan E. Cheresnik, Allen J. Harman, and John L. McGoldrick, appeal a summary judgment in favor of the City and County of San Francisco (hereafter City), the individual members of the San Francisco Airport Commission, and the director of the San Francisco International Airport. We reverse as to the claim for damages of the plaintiff Harman and otherwise affirm.

PROCEDURAL BACKGROUND

The plaintiffs, three White males employed as airfield safety officers at the San Francisco International Airport, initiated this litigation by filing a

complaint in federal court on September 3, 1999. After federal court proceedings not relevant to this appeal, the parties stipulated to filing a new complaint in state court.

In a petition for writ of mandate and complaint for declaratory and injunctive relief and damages, the plaintiffs allege that the appointment process for the position of 9220 Airport Operations Supervisor involved discrimination on the basis of race and sex in violation of Proposition 209 (art. 1, § 31, Cal. Const.) and the equal protection clause of the Fourteenth Amendment to the United States Constitution. The first three causes of action seek prospective equitable relief through an injunction, declaratory judgment, and writ of mandate commanding the defendants "to implement race- and sex-neutral recruitment, hiring, and promotional policies." The fourth cause of action states a claim for damages under Proposition 209 and the Civil Rights Act of 1871, as codified and amended in title 42 United States Code section 1983.

The defendants filed a demurrer and motion to strike that, among other things, attacked the fourth cause of action for damages on the ground that it failed to allege compliance with the Government Claims Act. (Gov. Code, § 905 et seq.) In an order filed June 25, 2001, the trial court sustained the demurrer to this cause of action with respect to the claim for damages under Proposition 209.

Following completion of discovery, the defendants filed a motion for summary judgment or, in the alternative, for summary adjudication. The trial court granted the motion for summary judgment in an order filed January 9, 2002, and entered a judgment dismissing the petition and complaint on March 20, 2002. The plaintiffs filed a timely notice of appeal.

FACTUAL BACKGROUND

As a department of the City and County of San Francisco, the San Francisco International Airport (hereafter Airport) fills all permanent positions through the civil service merit system mandated by section 10.101 of the Charter of the City and County of San Francisco. The City's department of human resources establishes minimum qualifications for particular job classifications, issues announcements inviting applicants to apply for vacancies, reviews applications, administers written, oral or performance tests, and places successful applicants on an eligible list for permanent hires. All permanent appointments must be made from the applicable civil service list, which typically lasts for a period of six months to two years. The precise method of selecting candidates from the list may vary according to agreements with particular labor unions. The Airport followed the "rule of the list," authorizing departments to select any candidate from the applicable list.

Not infrequently, there will be no civil service list in existence for a particular job classification. When a

department needs to fill a vacancy for such a job classification, the department of human resources may allow it to make a temporary or "provisional" appointment which will be effective until the department can make a permanent appointment in accordance with normal civil service procedures. Provisional appointments cannot be made for more than three years. (S.F. Charter, § 10.105.) In making a provisional appointment, the department creates a list of eligible employees through its own screening process, which is typically faster and less thorough than the civil service examination process. The list of eligible employees is sometimes drawn entirely from current City employees.

Since provisional eligibility lists are created for particular vacancies, they do not have any specified duration, but they are occasionally used to fill additional vacancies in the job classification that later occur. According to Dorothy Yee, the equal employment opportunity manager for the department of human resources, it is "very difficult for the department to establish that it should not conduct a new recruitment" when a provisional list is more than six months old. Nevertheless, the record contains evidence that provisional lists have in fact been used to fill vacancies as long as a year after the lists were created.[1]

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[1] Citing the deposition of Glenn Brotman, the airport operations coordinator, plaintiffs claim that the "longest pool

(Continued on following page)

Alternatively, when a department needs to fill a vacancy for a job classification for which no civil service list exists, it can select an employee to serve temporarily on an acting basis until a permanent civil service appointment may be made. An employee in an acting position receives only a temporary pay increase for working beyond his job classification until a permanent appointment is made. The department of human resources does not become involved in the selection of employees for acting appointments.

As required by ordinance and the conditions of federal funding, the Airport annually adopted a diversity staffing plan, which was intended to guide all phases of the hiring process in the department. (S.F. Admin. Code, § 16.9-24.) The 1998 plan stated the "long range goal" of employing "a workforce at San Francisco International Airport which is reflective of the available labor market for each occupational category in San Francisco and San Francisco/ Bay Area." The plan analyzed the extent that women and five categories of minorities – African-Americans, Hispanics, Asians, Filipinos, and American Indians were underrepresented in particular job groupings relative to the regional labor market and set "good

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lasted 'about two years for the pool.'" But when Brotman was asked what was the longest pool he could recall, he replied, "Probably a year." Upon further questioning, he noted that one pool had been *cancelled* about two years after its creation, but he did not indicate that it was actually used to make appointments up to that time.

faith quantitative objectives" designed to reduce the level of this underrepresentation. Airport managers and supervisors were expected to "[w]ork in conjunction with the diversity staffing coordinator in meeting the Airport's good faith diversity hiring objectives." The plan for the succeeding year, entitled Equal Employment Opportunity And Diversity Plan, July 1999, closely followed the policies of the 1998 plan.

At the beginning of each year, Airport management employees formulated personal goals on which they would be evaluated at the end of the year. Successful achievement of the goals could result in a bonus of 2 or 3 percent of salary. The record reveals that certain supervisory employees adopted the goal of increased minority hiring pursuant to the diversity staffing plan. In 1999, for example, Rafael Centeno, the airport director of human resources, expressed the goal of increasing minority employment by 20 percent in custodian, operations, and engineering jobs.

For the fiscal year beginning July 2000, the Airport adopted an equal employment opportunity plan that marked a sharp departure from the earlier plans. The plan omitted any mention of goals and timetables to remedy the underutilization of minorities in occupational categories and stated instead the intention "to review promotional practices to ensure that everyone has equal opportunity to compete for advancement." To this end, the plan sought to implement a "program to remove barriers that have operated to preclude employment opportunities to

historically under-utilized class members. . . ." While it continued to monitor the employment of minorities in broad job categories, the plan stated that "[t]hese statistics do not represent quotas, goals, or timetables. Instead, these statistics are intended to provide one tool for the Airport to use to assess whether barriers exist to equal employment opportunity at the Airport." If the statistics should indicate the possibility of practices operating as barriers to equal employment opportunity, the plan stated only that "the Airport will examine these practices." For purpose of this appeal, the plan for the next fiscal year beginning July 2001 was substantially identical to the July 2000 plan.

Before addressing the plaintiffs' claim of racial discrimination, we must first review the history of personnel actions giving rise to the plaintiffs' claims. In October 1997, the Airport determined that it needed to fill vacancies for the job classification of 9220 Airport Operations Supervisor, although there was no civil service list for the position. On October 24, 1997, it issued an announcement that it would accept applications for a provisional appointment to this position. On November 12, 1997, the Airport issued a revised announcement that extended the period for submitting applications and changed the description of minimum educational experience. While the initial announcement required a bachelor's degree in aviation management or related field, the revised announcement permitted experience in relevant field-related operations to be substituted for education on a year-for-year basis.

In December 1997, after reviewing the applications and conducting interviews, the Airport chose an eligibility list of seven candidates, including each of the three plaintiffs, from which to make provisional appointments to the 9220 Airport Operations Supervisor position. All persons on the list were White and five were male. In the next five months, the Airport made two provisional appointments from the list.

In October 1998, the Airport requested the department of human resources for authorization to appoint a third candidate, Michael Robert, from the provisional eligibility list. The request was reviewed by the Department's equal employment opportunity manager, Dorothy Yee, who raised several objections in conversations with Rafael Centeno, the airport director of human resources. In a declaration in support of summary judgment, Yee explained, "First, given the age of the pool, questions about the Airport's recruitment efforts for the position and irregularities with the job announcement, I was concerned that others should be given an opportunity to compete for the open position. Second, I was concerned about possible discrimination against minorities in the process used to create the pool." The record contains evidence that the recruitment efforts for the provisional eligibility list did not extend to other jurisdictions or public entities or the military and that the interview panel passed over several minority applicants in selecting employees for the list.

The plaintiffs maintain that Yee's actual reason for opposing use of the list was to advance the objective of

the diversity staffing plan to reduce the underrepresentation of racial minorities in the Airport workforce. They point to evidence of "pervasive pressure" on management to promote minority candidates. Yee's handwritten telephone log note appears to support the plaintiffs' interpretation. Yee wrote "pushing Lamont Foster [Airport Operations Superintendent] to hire next appts will be minority." (*Sic.*) Moreover, the three plaintiffs each testified that their supervisors candidly told them that the list had been cancelled because it was not ethnically diverse. (Cheresnik: "not ethnically diverse enough"; Harman: "not racially diverse . . . too White for City Hall"; McGoldrick: "not racially diverse enough.")

Ultimately, Yee approved the appointment of Michael Robert, who was formally appointed to the position in January 1999, but the airport director of human resources, Rafael Centeno, stated that his Department decided "in approximately November 1998" that no further persons would be appointed from the provisional eligibility list. Before the provisional list was cancelled, Glenn Brotman, the airport operations coordinator with primary responsibility for staff promotions, and Kimberly Dickie, an airport operations coordinator who had participated in selecting the provisional eligibility list, had jointly decided that Allen Harman would be the next candidate selected from the list. Harman had been employed by the Airport since 1991 – longer than either of the other plaintiffs – and had worked as an airfield safety officer for approximately five years; McGoldrick and

Cheresnik had served in this position for a little over two years.

In January 1999, a vacancy occurred in the job classification of 9220 Airport Operations Supervisor as the result of the promotion of an employee. The Airport initially announced an opening for a provisional appointment. Like the revised November 1997 announcement, the announcement permitted applicants to substitute relevant experience for years of college education. In March, the Airport decided to act more quickly in filling the position by making an appointment to an "acting supervisor position."

The Airport formed a review panel composed of a personnel analyst, the airfield operations manager, and an operations superintendent. The panel reviewed a total of "16 or 17" applications received in response to the two previous provisional job announcements in October-November 1997, and in January 1999, and rated the applicants in four areas on a scale of one to five. The six top-scoring candidates, who did not include any of the plaintiffs, were then interviewed. The panel unanimously decided to hire Dennis Neves, a Pacific Islander, who was the applicant who scored highest in the initial screening. Neves was among "many" candidates who had applied in response to the 1999 announcement but not the earlier October November 1997 announcement. He accepted the appointment on April 12, 1999.

In September 1999, the City issued a civil service examination announcement for the job classification

of 9220 Airport Operations Supervisor. By the end of January 2000, the City selected an eligible list of 26 candidates who met the minimum requirements. The list included each of the plaintiffs but did not include Dennis Neves, who had been promoted to a higher position of airport duty manager in November 1999. On March 31, 2000, the Airport then interviewed the candidates on the eligible list and ranked them in order of their qualifications. Harman was ranked second, below an employee who was one of the 1998 provisional appointments to the position and above Michael Robert who was ranked fourth. McGoldrick ranked fifth and Cheresnik was seventh.

In May 2000, the Airport permanently appointed the six highest ranked candidates to the position of airport operations supervisor, including the plaintiffs Harman and McGoldrick and the last provisional appointment, Michael Robert. After Michael Robert chose to take another position, the Airport appointed the seventh ranked person on the eligibility list. The plaintiff Cheresnik was not appointed and the list expired near the end of July 2000. Of the six appointments that were ultimately made, one was female and another was African-American; the others were White males.

DISCUSSION

In its order granting summary judgment, the trial court properly made separate rulings with respect to prospective relief relating to the City's

personnel policies and remedial relief relating to the grievances of the three plaintiffs.

The order denying prospective relief was predicated on a finding that the "[p]laintiffs failed to establish any triable issue of material fact that defendants' *current* policies or practices violate the equal protection clause or Proposition 209." [Emphasis added.]

The order denying remedial relief involved preliminary issues relating to the order sustaining the defendants' demurrer to the claim for damages under Proposition 209 and an order broadly granting all evidentiary objections. With respect to the substantive right of recovery under the fourth cause of action for damages, the order finds that the plaintiffs did not suffer an actionable injury as a result of the temporary appointment of Neves because, "even assuming that the . . . appointment of Neves was motivated in part by his race," the appointment would have been made in any event on the basis of Neves's superior qualifications for the position. With regard to the permanent appointments in 2000, the court found that Harman and McGoldrick suffered no injury because they were in fact promoted and Cheresnik "failed to raise any triable issue of material fact that the Airport denied [him] the promotions because of his race or gender."

A. Standard of Review

In general, the trial court must grant summary judgment if "there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) But because "[s]ummary judgment is a drastic measure that deprives the losing party of a trial on the merits" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107), we are obliged to "view such evidence [citations] . . . in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

A defendant moving for summary judgment bears the burden of proving that the plaintiff's "action has no merit." (Code Civ. Proc., § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co., supra* 25 Cal.4th 826, 850.) Under Code of Civil Procedure section 437c, subdivision (p)(2), a defendant "has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established. . . ." In other words, the defendant "must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not. . . . (*Aguilar, supra,* at

p. 851; *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878-879.) To this end, the defendant may present either evidence that conclusively negates an element of the plaintiff's cause of action, or evidence, such as deposition testimony of plaintiff's witnesses, that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. (*Aguilar, supra,* at p. 855; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2002) ¶ 10.245.10, p. 10-81.)

B. Prospective Relief

1. Legal Framework

(a) Equal Protection Clause of Fourteenth Amendment

"The Equal Protection Clause provides that '[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.' U.S. Const., Amdt. 14, § 1. Its central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race. *Washington* v. *Davis,* 426 U.S. 229, 239 (1976). Laws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition." (*Shaw v. Reno* (1993) 509 U.S. 630, 642.)

"This strong policy [of the Fourteenth Amendment] renders racial classifications 'constitutionally suspect,' [citation]; and subject to the 'most rigid scrutiny,' . . . " (*McLaughlin v. Florida* (1964) 379 U.S. 184, 192.) "'"Any preference based on racial or

ethnic criteria must necessarily receive a most searching examination.'" (*Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200, 223, citations omitted.) Legislation that "expressly distinguishes among citizens because of their race" will withstand challenge under the Fourteenth Amendment only if it is "narrowly tailored to further a compelling governmental interest." (*Shaw v. Reno, supra,* 509 U.S. 630, 643.)

In the past 25 years, the jurisprudence of the equal protection clause of the Fourteenth Amendment has evolved to confer a personal right that may be asserted by a person of any race, without regard to membership in a group suffering from a history of racial discrimination. This interpretation has its origin in Justice Powell's opinion in *University of California Regents v. Bakke* (1978) 438 U.S. 265 and was followed by plurality decisions in *Fullilove v. Klutznick* (1980) 448 U.S. 448 and *Wygant v. Jackson Board of Education* (1986) 476 U.S. 267 and ultimately by a majority decision in *Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 493-498 (*Croson*). As concisely stated in *Croson,* "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." (*Id.* at p. 494.)

The Supreme Court has applied these principles to strike down quotas and preferences favoring minority groups. In *Croson, supra,* 488 U.S. 469, the court considered a "Minority Business Utilization Plan" of Richmond, Virginia, which required 30

percent by dollar amount of municipal contracts be awarded to minority business enterprises. (*Id.* at p. 477.) The court regarded the plan as being based on a racially discriminatory classification, by which it denied "certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race." (*Id.* at p. 493.) Holding that the plan violated the equal protection clause, the court found that it could not be justified on the ground that it served the end of rectifying the effects of past discrimination because the record failed to show that it was "narrowly tailored" for that purpose. (*Croson, supra,* at pp. 507-511.)

Again, in *Adarand Constructors, Inc. v. Pena, supra,* 515 U.S. 200, the Supreme Court reviewed a clause in a public contract that awarded additional compensation to highway contractors who awarded subcontracts to small businesses "'owned and controlled by socially and economically disadvantaged individuals.'" (*Id.* at p. 209.) Finding that the definition of such individuals employed racial classifications, the court held that the clause was subject to strict scrutiny to determine whether it was narrowly tailored to serve a compelling governmental interest. (*Id.* at p. 227.) Since the lower courts had failed to apply this standard of review, the case was remanded for further proceedings. (*Id.* at pp. 237-239.)

(b) Proposition 209

In the general election in November 1996, California voters approved Proposition 209 which added section 31 to article I of the California Constitution. Subdivision (a) of section 31 provides: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." The provision withstood a federal constitutional challenge in *Coalition for Economic Equity v. Wilson* (9th Cir. 1997) 122 F.3d 692 and was authoritatively construed in *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537 and applied in two intermediate court decisions, *Crawford v. Huntington Beach Union High School Dist.* (2002) 98 Cal.App.4th 1275 and *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16.

Our high court in *Hi-Voltage* observed that "section 31 closely parallels . . . in both language and purpose" title VII of the Civil Rights Act of 1964. (*Hi-Voltage Wire Works, Inc. v. City of San Jose, supra,* 24 Cal.4th 537, 549; 42 U.S.C. § 2000e et seq., as amended by the Equal Employment Opportunity Act of 1972 (Pub.L. No. 92-261, § 2 (Mar. 24, 1972), 86 Stat. 103).) The legislative history, the court inferred, reflected an intention to return to the "analytical framework of Title VII jurisprudence" that antedated the United States Supreme Court decision in *Steelworkers v. Weber* (1979) 443 U.S. 193. (*Hi-Voltage Wire Works, Inc. v. City of San Jose, supra,* at p. 551.)

This early interpretation of title VII emphasized "[t]he purpose of Title VII was to ensure equal opportunity for all. Thus, discriminatory practices were forbidden irrespective of the victim's race." (*Hi-Voltage Wire Works, Inc. v. City of San Jose, supra,* at p. 551.) Relief could serve "to eradicate the effects of specific discriminatory practices, but courts had no obligation or authority to require any particular affirmative hiring or other employment practices. In other words, consistent with congressional intent, the court's construction confirmed and reinforced the role of government as color-blind in these matters." (*Id.* at p. 551.)

This interpretation, the court held, was also dictated by the "natural and ordinary meaning" of the language of Proposition 209. The court noted, "'[D]iscriminate' means 'to make distinctions in treatment; show partiality (*in favor of*) or prejudice (*against*)' [citation]; 'preferential' means giving 'preference,' which is 'a giving of priority or advantage to one person . . . over others.' [Citation.]" (*Hi-Voltage Wire Works, Inc. v. City of San Jose, supra,* 24 Cal.4th 537, 559-560, fn. omitted.) This language, the court concluded, was "clear[ ] and literally interpreted does not lead to absurd results. . . ." (*Id.* at p. 560.)

Applying this interpretation of the provision, the court held that Proposition 209 barred a program of the City of San Jose that required contractors bidding on city projects to comply with either a participation or outreach requirement for subcontracting with minority business enterprises. The contractor could

meet the participation requirement by showing that it used a representative number of minority business enterprises. (*Hi-Voltage Wire Works, Inc. v. City of San Jose, supra,* 24 Cal.4th 537, 543.) If a contractor could not meet this requirement, it was required to document outreach efforts by maintaining records of written notices to at least four certified minority business enterprises; recording at least three attempts to contact these minority businesses to determine their interest in the project; negotiating in good faith with any businesses that expressed interest; and specifying in writing the reasons for rejecting any bids prepared by the businesses. (*Id.* at p. 543.)

The *Hi-Voltage* court held that "[t]he participation component authorizes or encourages what amounts to discriminatory quotas or set-asides, or at least race- and sex-conscious numerical goals. [Citations.] A participation goal differs from a quota or set-aside only in degree; by whatever label, it remains 'a line drawn on the basis of race and ethnic status' as well as sex." (*Hi-Voltage Wire Works, Inc. v. City of San Jose, supra,* 24 Cal.4th 537, 562-563.) Similarly, "[t]he outreach component requires contractors to treat [minority business enterprise] subcontractors more advantageously by providing them notice of bidding opportunities, soliciting their participation, and negotiating for their services. . . . The relevant constitutional consideration is that [the contractors] are compelled to contact [minority business enterprises], which are thus accorded preferential treatment within the meaning of section 31." (*Id.* at p. 562.)

Two Court of Appeal decisions have rigorously applied Proposition 209 to invalidate programs intended to achieve greater racial and ethnic diversity. In *Crawford v. Huntington Beach Union High School Dist., supra,* 98 Cal.App.4th 1275, the school district restricted transfers to and from a high school, which had a large concentration of minority students. White students could transfer out of the school only if another White student transferred in; minority students could transfer into the school only when another minority student transferred out. Holding that the transfer policy violated Proposition 209, the court reasoned that "the policy creates different transfer criteria for students solely on the basis of their race." (*Id.* at p. 1284.)

In *Connerly v. State Personnel Bd., supra,* 92 Cal.App.4th 16, the court construed Proposition 209 as extending beyond the reach of the federal equal protection clause. "Under equal protection principles, all state actions that rely upon suspect classifications must be tested under strict scrutiny, but those actions which can meet the rigid strict scrutiny test are constitutionally permissible. Proposition 209, on the other hand, prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the government action could be justified under strict scrutiny." (*Connerly v. State Personnel Bd., supra,* at p. 42.) Applying this interpretation of Proposition 209, the court invalidated all or portions of five state affirmative action programs.

2. Equitable Relief

The prospective equitable remedies which the plaintiffs seek are guided by certain requirements and principles. "A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins. . . ." (Code Civ. Proc., § 1085.)" 'Two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the respondent [citations]; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty [citation].' [Citation.]" (*Loder v. Municipal Court* (1976) 17 Cal.3d 859, 863; *Construction Industry Force Account Council v. Delta Wetlands* (1992) 2 Cal.App.4th 1589, 1596; *Steelgard, Inc. v. Jannsen* (1985) 171 Cal.App.3d 79, 83; 8 Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs, § 72, p. 853.)

With regard to declaratory relief, Code of Civil Procedure section 1060 provides: "[a]ny person interested . . . under a contract . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action . . . in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the . . . contract." We assume without deciding that the employment relationship between plaintiffs and the Airport constitutes a contract within the meaning of this statute, but, the requirement of an actual controversy still requires that

plaintiffs show the existence of a right that the Airport denies to them. (*Maguire v. Hibernia Savings & Loan Soc.* (1944) 23 Cal.2d 719, 728; 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 817, p. 273.) Code of Civil Procedure section 1061 adds: "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."

The granting of injunctive relief, though often combined with declaratory relief, is subject to distinct equitable principles. "California adheres to the rule . . . that '[i]njunction "is an extraordinary power, and is to be exercised always with great caution" and the power rarely, if ever, should be exercised in a doubtful case. [Citations.] If, therefore, at the time of the order or judgment, in the absence of special circumstances . . . , there is no reasonable probability that past acts complained of will recur, injunctive relief will be denied. Injunctive power is not used as punishment for past acts and is ordered against them only if there is evidence they will probably recur. [Citations.] A court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued in the absence of any evidence that the acts are likely to be repeated in the future.'" (*Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1040, quoting *Mallon v. City of Long Beach* (1958) 164 Cal.App.2d 178, 190; see also *East Bay Mun. Utility Dist. v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1113, 1126.)

Despite the complexity of the law, the plaintiffs' right to equitable relief involves certain common factual issues. It is clear that the 1998 diversity staffing plan and its successor for the year 1999 are inconsistent both with the evolving concepts of equal protection and with Proposition 209 to the extent that they establish the objective of remedying the under-representation of minorities in occupational categories. This objective cannot be implemented without distinguishing between employees on the basis of race and necessarily involves goals and timetables indistinguishable from the quotas and preferences prohibited by *Adarand* and *Croson*. Under the more stringent standards of Proposition 209 as interpreted by the court in *Hi-Voltage,* the express policy of creating a workforce reflecting the racial and ethnic diversity of the larger labor market inevitably involves prohibited racial discrimination and preferences.

The prayer for equitable relief refers specifically to a list of 12 challenged practices reflected in, or intended to implement, the 1998 and 1999 employment diversity plans. In their filings in opposition to the motion for summary judgment, the plaintiffs produced a measure of evidence regarding the existence of these practices. If the practices were currently in effect, this evidence would raise triable issues of denial of equal protection under section 1983 and of discrimination and preferences under Proposition 209.

The Airport, however, relies on the shift in policy initially expressed in the equal employment opportunity plan, July 2000, and continued the following

year. The 2000 plan omits the practices challenged in the plaintiffs' complaint and broadly states policies consistent with current equal protection jurisprudence and Proposition 209. In place of the objective of remedying underutilization of minorities, the 2000 plan states a policy of removing barriers to employment that may operate to discriminate on the basis of race or ethnicity. The employment of minorities is monitored solely to direct attention to areas where personnel practices may effectively operate to favor a particular group. The propriety of this approach to equal employment was first recognized in *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431, and remains beyond question. (See *Hi-Voltage Wire Works, Inc. v. City of San Jose, supra,* 24 Cal.4th 537, 549-550.)

This change in policy, the Airport maintains, deprives the plaintiffs of any basis for prospective equitable relief. The changed policy establishes that the Airport has already performed the duty that the plaintiffs seek to enforce in the petition for writ of mandate. It defeats the claim of an actual controversy, required by declaratory relief, by establishing that the Airport is not denying the right that the plaintiffs assert. And with regard to injunctive relief, it calls for application of the principle that a court of equity will not grant an injunction "to prevent in the future that which in good faith has been discontinued in the absence of any evidence that the acts are likely to be repeated in the future." (*Mallon v. City of Long Beach, supra,* 164 Cal.App.2d 178, 190.)

The plaintiffs counter with two arguments. First, they characterize the Airport's change in policy as a litigation tactic and point to precedents where the courts have granted relief despite a defendant's voluntary discontinuation of a practice during litigation. Thus, in *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 929, the court held that "'the voluntary discontinuance of alleged illegal practices does not remove the pending charges of illegality from the sphere of judicial power or relieve the court of the duty of determining the validity of such charges where by the mere volition of a party the challenged practices may be resumed.' [Citation.]" (See also *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* (2000) 528 U.S. 167, 189; *Kidd v. State of California* (1998) 62 Cal.App.4th 386, 399.)

It is implausible, however, to regard the Airport's change of policy in the year 2000 plan as a ploy to secure dismissal of the plaintiffs' claims since it was adopted approximately one year before the Airport filed its motion for summary judgment. The revised policy clearly reflects the evolving legal standards of employment discrimination. The policy reflected in the 1998 and 1999 plans was consistent with a line of federal and state decisions commencing with *Steelworkers v. Weber, supra,* 443 U.S. 193 and *Price v. Civil Service Com.* (1980) 26 Cal.3d 257, which sought to "overcome the continuing effects of past discrimination." (*Price, supra,* at p. 270.) Our high court did not authoritatively reject this line of authority until

its decision in *Hi-Voltage* was rendered in November 2000. The Airport's year 2000 plan appears to have anticipated this evolving legal interpretation by four months.

It may perhaps be suggested that the Airport should have acted sooner, perhaps after the *Adarand* decision was rendered in 1995 or after *Coalition for Economic Equity v. Wilson, supra,* 122 F.3d 692 upheld the constitutionality of Proposition 209 in 1997. But we find no basis in the record to question the Airport's commitment to conform to changing legal standards in the area of employment policy. A month after the decision in *Connerly v. State Personnel Bd., supra,* 92 Cal.App.4th 16, the Airport issued a memorandum to all managers and supervisors calling their attention to the 2001 equal employment opportunity plan and affirming a policy that "all Airport employment decisions shall be made on the basis of merit and fitness, without regard to the race, ethnicity or gender of applicants or employees."

Secondly, plaintiffs maintain that equitable relief is needed to prevent the continuation of past practices that existed under the 1998 and 1999 plans. Citing a quotation from *Adickes v. Kress & Co* (1970) 398 U.S. 144, 167, in *Monell v. New York City Dept. of Social Services* (1998) 436 U.S. 658, 691, they suggest that "'discriminatory practices of state officials . . . could well be so permanent and well settled as to constitute a "custom or usage" with the force of law.'" (Fn. omitted.) But *Monell* concerned sexual discrimination in employment and *Adickes* involved racial

prejudices in the former Confederacy. In the case at bar, plaintiffs have at best raised the possibility of administrative inertia in discontinuing past policies intended to remedy underutilization of minorities in the Airport workforce. The possibility of such administrative inertia, we think, falls short of raising a triable issue with respect to the requirements for the exercise of the court's equitable powers to issue a writ of mandate or to grant declaratory or injunctive relief (i.e., the Airport's duty to take action to which the plaintiffs have a right, an actual controversy involving the Airport's denial of a right that the plaintiffs assert, or the Airport's failure to discontinue the past practices in good faith).

C. Claim for Damages under Proposition 209

In addressing the plaintiffs' fourth cause of action for damages, we must first consider whether damages are recoverable under Proposition 209 or only under 42 U.S.C. section 1983. We hold that the trial court properly sustained the defendants' demurrer to the fourth cause of action with respect to plaintiffs' claims for damages under Proposition 209 on the ground that the plaintiffs failed to comply with the Government Claims Act. (Gov. Code, § 905 et seq.)

"Under the Claims Act, no suit for 'money or damages' may be brought against a public entity until a written claim has been presented to the public entity and the claim either has been acted upon or is deemed to have been rejected. (Gov. Code, §§ 905,

945.4.) A suit for 'money or damages' includes all actions where the plaintiff is seeking monetary relief, regardless whether the action is founded in "'tort, contract or some other theory.'" [Citations.]" (*Hart v. County of Alameda* (1999) 76 Cal.App.4th 766, 778.) A "failure to allege compliance with the claims statute renders the complaint subject to a general demurrer or to a motion for judgment on the pleadings." (*Wood v. Riverside General Hospital* (1994) 25 Cal.App.4th 1113, 1119.)

In *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, the California Supreme Court applied these principles to a claim for damages for inverse condemnation arising under article 1, section 14, of the California Constitution. The court observed, "Compliance with the claims statutes is mandatory [citation]; and failure to file a claim is fatal to the cause of action. [Citation.] [¶] . . . The fact that inverse condemnation is founded directly on the California Constitution (art. I, § 14) neither excuses plaintiffs from compliance with the claims statutes [citations], nor renders the claims statutes unconstitutional." (*City of San Jose v. Superior Court, supra,* at pp. 454-455.) Though the Legislature later enacted a specific statutory exemption for inverse condemnation claims (Gov. Code, § 905.1), *City of San Jose* remains as authority that the scope of the claims statute encompasses claims based on Constitutional provisions.

Plaintiffs offer two theories to avoid the bar of the claims statute. First, they note that the claims

statute does not apply to "actions seeking specific relief other than money or damages, such as injunctive or declaratory relief, and certain actions in mandamus. . . . [¶] Furthermore, an action for specific relief does not lose its exempt status solely because incidental money damages are sought." (*Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 870; see also *Eureka Teacher's Assn. v. Board of Education* (1988) 202 Cal.App.3d 469, 475.) Thus, in *Harris v. State Personnel Bd.* (1985) 170 Cal.App.3d 639, 643, disapproved on other grounds in *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1123, the court held that the claims statute did not apply to an employee's petition for mandamus seeking reinstatement and backpay: "Back salary was clearly relief incidental to appellant's request for an order of reinstatement to his employment."

In the present case, however, the claim of damages has no connection with the prospective relief sought in the first three equitable causes of action and clearly fails to qualify as incidental relief. The fourth cause of action alleges a claim for damages resulting from denial of the plaintiffs' promotions; the equitable causes of action seek to compel the Airport to desist from practices associated with the 1998 and 1999 employment diversity plans.

Alternatively, plaintiffs maintain that Proposition 209 impliedly exempts claims for damages from the government claims statutes. Subdivision (g) of article 1, section 31, provides: "The remedies available

for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law." The plaintiffs note that claims under federal nondiscrimination statutes are exempt from the claims statutes by virtue of the supremacy clause (*Williams v. Horvath* (1976) 16 Cal.3d 834, 842) and that claims under the Fair Housing and Employment Act (FEHA) are exempt because the FEHA has "a functionally equivalent claim process." (*Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 764; *Snipes v. City of Bakersfield, supra,* 145 Cal.App.3d 861, 868-869.) They reason that remedies for violation of Proposition 209 should similarly be exempt so as to create remedies equivalent to those for violating California antidiscrimination law.

We do not find plaintiffs' argument persuasive. The exemption of federal claims from the claims statute under the supremacy clause is irrelevant to interpretation of subdivision (g) of Proposition 209, which refers to "remedies . . . available for violations of then-existing *California* antidiscrimination law." Moreover, an implied exemption from the claims statute would not cause subdivision (g) to operate in a manner parallel to the FEHA since the FEHA itself has a "functionally equivalent claim procedure." We conclude that claims under Proposition 209 remain subject to the claims statute, which applies generally to all "claims for money or damages against local public entities. . . ." (Gov. Code, § 905.)

D. Evidentiary Objections

The Airport filed extensive evidentiary objections to plaintiffs' statement of material facts in opposition to the motion for summary judgment. In the formal order granting summary judgment, the trial court issued a blanket ruling sustaining all of the defendants' objections without examining individual objections. The effect of the blanket ruling on the evidentiary objections is to "transfer[ ] the evidentiary ruling job to the appellate court. This is not always a simple task, and not one suitable to this court, normally sitting as a three-judge panel committed to reviewing issues of law, not fact." (*Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 236.) We express our displeasure at the practice of issuing a blanket ruling on multiple objections when each individual objection deserves discrete consideration. Although the practice undoubtedly eases the trial court's burden when confronted with a plethora of objections as in this case, it is nevertheless the duty of the trial court to rule on evidentiary objections in a meaningful way. (*City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784.)

Under Code of Civil Procedure section 437c, subdivision (d), the declarations in support of summary judgment must be based on admissible evidence. "Matters that would be excluded under the rules of evidence if offered by a witness in a trial, such as inadmissible hearsay or opinions, will be disregarded if an evidentiary objection is made, either

orally or in writing." (6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 204, p. 616.) Nevertheless, "[i]n performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [plaintiff's] evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

The Airport's objections were based on the ground of immateriality, hearsay, and lack of foundation or authentication. We consider that the objections on the ground of lack of foundation were properly sustained with respect to evidence concerning personnel actions affecting other job categories, including exhibits 2, 7, 8, 9, 11, 15, and 32. Liberally construing other evidentiary submissions in the plaintiffs' favor, we decline to sustain any further objections for the purpose of our de novo review of the record. Although a number of objections appear to have possible merit, we find that they raise issues that cannot be adequately resolved on the fragmentary record of the motion for summary judgment. Our ruling is without prejudice to the Airport's right to raise the objections on a fuller record at trial.

E. Remedial Relief

1. Legal Framework

The plaintiffs base their claims for remedial relief on the denial of promotional opportunities in violation of the equal protection clause of the U.S. Constitution and Proposition 209 (Cal. Const., art. I, § 31). We have held that the latter claim was properly dismissed for failure to comply with the Government Claims Act.

The federal claim for violation of the equal protection clause arises under title 42 United States Code section 1983 (hereafter section 1983).[2] As explained in *Poolaw v. City of Anadarko* (10th Cir. 1981) 660 F.2d 459, 462, "[s]ection 1983 provides a remedy for state action that purposefully discriminates on the basis of race in violation of the equal protection clause of the Fourteenth Amendment. [Citation.] The protection afforded by section 1983 includes relief from discriminatory employment practices of public employers." (See also *Collins v. Harker Heights* (1992) 503 U.S. 115.)

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[2] Section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

The parties do not dispute that, under the circumstances of the present case, the denial of the plaintiffs' promotion to the job classification of airport operations supervisor was the sort of tangible and adverse employment action which may give rise to a claim of denial of equal protection under section 1983. In the field of employment discrimination, "generally the denial of a promotion is an adverse employment action." (*Pennington v. City of Huntsville* (11th Cir. 2001) 261 F.3d 1262, 1267; see also *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 761; *Hunt v. City of Markham, Ill.* (7th Cir. 2000) 219 F.3d 649, 654.) The fact that the plaintiffs were on a short list from which promotions were made places the present case within the general rule.

To prove a violation of equal protection entitling them to relief under section 1983, the plaintiffs must show that the Airport's denial of promotion was motivated by a "discriminatory intent or purpose." (*Arlington Heights v. Metropolitan Housing Corp.* (19776 [sic]) 429 U.S. 252, 265.)" [T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." (*Washington v. Davis* (1976) 426 U.S. 229, 240.) Accordingly, in the *Washington* decision, the court held that proof of the disproportionate impact among racial groups of a qualifying examination for police recruits did not reveal a violation of the equal protection clause in the absence of a showing of a racially discriminatory purpose.

The equal protection clause, however, does not "require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes." (*Arlington Heights v. Metropolitan Housing Corp., supra,* 429 U.S. 252, 265.) It is sufficient to prove that a racially discriminatory purpose was a "motivating factor" in the adverse employment action. (*Id.* at p. 266.) In *Arlington Heights,* the Supreme Court explains, "[I]t is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified. [¶] Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." (*Id.* at pp. 265-266, fn. omitted.)

Where an adverse employment action reflects a mixture of legitimate and illegitimate considerations, the plaintiff has the initial burden of showing that a racially discriminatory purpose was a motivating factor in the action. If the plaintiff carries this burden, however, the employer may show "by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." (*Mt. Healthy City Board of Ed. v. Doyle* (1977) 429 U.S.

274, 287 (hereafter *Mt. Healthy City*).)[3] In *Mt. Healthy City,* the Supreme Court first applied this burden-shifting procedure to a suit under section 1983 brought by a teacher who was discharged in part because of exercise of his constitutionally protected right of free speech. Later, in *Price Waterhouse v. Hopkins, supra,* 490 U.S. 228, the court required the same procedure in a suit under title VII of the Civil Rights Act of 1964, and made clear that "the employer's burden is most appropriately deemed an affirmative defense." (*Price Waterhouse v. Hopkins, supra,* at p. 246.)

In *Texas v. Lesage* (1999) 528 U.S. 18, the court relied on *Mt. Healthy City* to find that the defendant

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[3] A line of cases stemming from *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 and *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248 employ similar but distinct burden-shifting procedure where the employer advances a nondiscriminatory justification for an employment action, which the employee challenges as pretextual. (E.g., *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 142-143; *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 121; *Chuang v. University of California Davis* (9th Cir. 2000) 225 F.3d 1115, 1123-1124.) In his concurring decision in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 260, Justice White succinctly explains, "The Court has made clear that 'mixed-motives' cases, such as the present one, are different from pretext cases such as *McDonnell Douglas* and *Burdine.* In pretext cases, 'the issue is whether either illegal or legal motives, but not both, were the "true" motives behind the decision.' [Citation.] In mixed-motives cases, however, there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate."

was entitled to summary judgment. The plaintiff, a Caucasian, applied for admission to a Ph.D. program at the University of Texas. After being rejected, he sued the university under section 1983, alleging that it had violated the equal protection clause of the Fourteenth Amendment by "maintaining a race-conscious admissions process." (*Texas v. Lesage, supra,* at p. 19.) The university secured a summary judgment on a showing that "even if the school's admissions process had been completely colorblind," the plaintiff would not have been a close contender for the elite program offered by the university. (*Ibid.*)

Affirming the summary judgment, the Supreme Court construed *Mt. Healthy City* to mean that "even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration. . . . [¶] Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983." (*Texas v. Lesage, supra,* 528 U.S. 18, 20-21; see also *Crawford El v. Britton* (1998) 523 U.S. 574, 593; *Donahue v. City of Boston* (1st Cir. 2002) 304 F.3d 110, 117; *Aiken v. Hackett* (6th Cir. 2002) 281 F.3d 516, 519.)

2. Application to Facts

In this appeal, we apply these principles to three employment decisions: the cancellation of the provisional eligibility list, the temporary appointment, and the permanent civil service appointments. In its order granting summary judgment, the trial court treated the temporary appointment – and by implication the cancellation of the provisional eligibility list – as involving a mixture of discriminatory and nondiscriminatory factors. The court assumed that the temporary appointment was made "in part because of his [Neves's] race." In contrast, the court found no evidence that the permanent appointments were tainted by discriminatory considerations. It found that Cheresnik – the only plaintiff aggrieved by the permanent appointments – "failed to raise any triable issue of material fact that the Airport denied . . . the promotions because of his race or gender."

Though the facts differ somewhat, the two mixed-motives decisions are governed by the same precedents, in particular *Price Waterhouse, Mt. Healthy City,* and *Lesage*. Turning first to the cancellation of the provisional eligibility list, we note the record discloses evidence from which the trier of fact could find a racially discriminatory motive. The finder of fact would have a reasonable basis in the record to infer that the Airport cancelled the list in part because all members were White in light of the official policy to achieve racial diversity reflected in the objectives of the diversity staffing plan, the evidence of its pervasive implementation, the telephone log of

Dorothy Yee, and the statements of the plaintiffs' superiors.

The record, however, provides support for other nondiscriminatory reasons for canceling the provisional eligibility list. In her declaration, Dorothy Yee pointed to "possible discrimination against minorities in the process used to create the pool" and to "irregularities with the job announcement" for the provisional list, presumably including limited outreach efforts and a belated change in educational requirements. If indeed the methods used to create the provisional list failed to give minorities a fair opportunity to compete for the job, the continued use of the list would perpetuate this unfairness and operate as the sort of "unnecessary barrier [ ] to employment" condemned by *Griggs v. Duke Power Co., supra,* 401 U.S. 424, 431. The Airport, however, did not seek summary judgment on this ground. Instead, the Airport relied on evidence that cancellation of the provisional eligibility list was a routine application of a policy limiting the use of provisional lists beyond six months. The record reveals that the provisional lists are sometimes used to fill more than one vacancy over a period of time, but, after six months has elapsed, the department of human resources strongly favors termination of the provisional list and initiation of a new recruitment effort.

Despite this evidence of a policy limiting the life of provisional eligibility lists, we think there was a triable issue that Harman was prejudiced by cancellation of the list. The record discloses that as late as

October 1998 – approximately ten months after creation of the provisional eligibility list – the airport operations coordinators responsible for the promotions of airfield safety officers intended to make two more appointments from the provisional eligibility list, first Michael Robert and then Allen Harman. Despite opposition from the human relations department, they ultimately secured approval for Robert's appointment. The next vacancy occurred in January 1999 after the list was cancelled and thirteen months after it was created.

While the extension of a provisional list for a period of 13 months would have been unusual and perhaps unprecedented, there was evidence that lists had been extended for as long as a year. Since operations department supervisors contemplated making two more appointments from the list as late as ten months after it was created, the finder of fact could reasonably find that, in this instance, the list would have been extended long enough to promote Harman as well as Robert, if the department of human resources had not opposed the extension. Thus, Harman may predicate his claim on the Department's reasons for canceling the list. Since there was evidence that these reasons included racially discriminatory considerations, the trial court erred in granting the Airport summary judgment dismissing his claim for damages.

Under the *Lesage* decision, however, the considerations involved in canceling the provisional eligibility list are irrelevant to the claims of McGoldrick and

Cheresnik, since the provisional eligibility list would not in any event have been extended long enough to assist them. Unlike Harman, they could not claim to be next on the order of contemplated promotions. More importantly, there was no prospect of another appointment until far beyond the normal life of a provisional eligibility list. The Airport in fact made only one appointment to airport operations supervisor in the 16 months after cancellation of the provisional eligibility list in November 1998 – the temporary appointment of Neves in April 1999. The normal reasons for engaging in a new recruitment effort were fully present here. While the finder of fact could reasonably find that the new recruitment would be deferred until after Harman's appointment, it would have to presuppose a complete abandonment of established procedures to find that the other two plaintiffs' would be benefited.

We turn next to the claim of McGoldrick and Cheresnik based on the temporary appointment of Neves in April 1999.[4] Since the temporary appointment was closely tied in chronology and purpose to the earlier decision to cancel the provisional eligibility list, the trier of fact could reasonably infer a discriminatory purpose from the evidence supporting

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[4] While Harman also claims to have been prejudiced by this decision, we have already found that he is entitled to reversal of the judgment based on cancellation of the provisional eligibility list and therefore do not need to consider additional elements of his claim.

such an inference in that decision. An inference of discrimination might also be strengthened by the circumstance that Harman and McGoldrick placed near the top of competition for the provisional list and later for the permanent civil service list but did not place high enough to secure an interview for the temporary appointment.

Conceding a possible basis for inferring discriminatory intent, the Airport maintains that McGoldrick and Cheresnik have no "cognizable injury warranting relief" under *Lesage* because they had no reasonable prospect of being chosen for the temporary appointment. (*Texas v. Lesage, supra,* 528 U.S. 18, 21.) The record in fact discloses that Neves possessed markedly superior qualifications for the appointment. The three members of the review panel gave Neves a combined score of 51 out of a possible 60, as compared to 34 for McGoldrick and 23 for Cheresnik. Each of the panelists gave Neves a higher score in each of the three categories of evaluation than either McGoldrick or Cheresnik.

Neves had worked as an airfield safety officer for approximately eight years. McGoldrick and Cheresnik had both worked somewhat more than three years in this position. Prior to his employment with the Airport, Neves had worked for 19 years in the airline industry, of which 15 years were as a supervisor and manager. All of Neves's work experience was relevant to the duties of an airport operations supervisor; among other things, he had been general manager for AirCal Airlines in Oakland and Sacramento

and manager of facilities and ground equipment maintenance for American Airlines in San Francisco. McGoldrick had approximately six years of supervisory experience and Cheresnik could claim only supervisory experience incidental to his duties as airfield safety officer. Though Neves had not applied for the provisional appointment, he had previously qualified for the eligibility list for operations supervisor and operations coordinator. Within a year after receiving the temporary appointment to operations supervisor he was promoted to a permanent airport duty manager position.

This evidence, in our opinion, comes within the parameters of *Lesage* by establishing that, even if race played a role in the temporary appointment, the Airport "would have made the same decision without the impermissible motive." (*Texas v. Lesage, supra,* 528 U.S. 18, 21.)

Lastly, we turn to the six permanent appointments made through the civil service selection process. Since McGoldrick was among those promoted as a result of this competition, only Cheresnik can claim to be aggrieved. As noted earlier, the trial court found that "Cheresnik failed to raise any triable issue of material fact that the Airport denied Cheresnik the promotions because of his race or gender." In our independent review of the record, we find no evidence from which it could be inferred that race was considered in interviewing or ranking candidates for the position. While the candidates on the civil service list were identified both as to gender and ethnicity, we do

not think that this evidence alone presents a triable issue of racial discrimination. The evidence of possible discrimination in the earlier decisions relating to the provisional eligibility list and the temporary appointment has no relevance to the highly structured decisionmaking process involved in the civil service appointment, which occurred a year or more later under different policy guidelines.

Moreover, even if race played a role in the permanent appointments, the Airport was still entitled to summary judgment under *Lesage* on the ground that the same decision would have been made without the discriminatory intent. The evidence discloses that the Airport made the appointments from the top seven candidates in the order of their ranking in the examination process. Cheresnik was ranked eleventh.

We reverse the portion of the judgment dismissing the fourth cause of action of the plaintiff Harman and affirm the judgment as it applies to other plaintiffs and causes of action.[5] Both parties are to bear their own costs on appeal.

Swager, J.

[5] The request for judicial notice is denied.

We concur:

Marchiano, P.J.

Margulies, J.

Court of Appeal, First Appellate District,
Div. 1 – No. A115519
S160463

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ALEX HARMAN, Plaintiff and Respondent,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant and Appellant.

(Filed Mar. 12, 2008)

The petition for review is denied.

The request for an order directing depublication of the opinion is denied.

Baxter and Corrigan, JJ., are of the opinion the petition should be granted.

Moreno, J., was absent and did not participate.

GEORGE
Chief Justice